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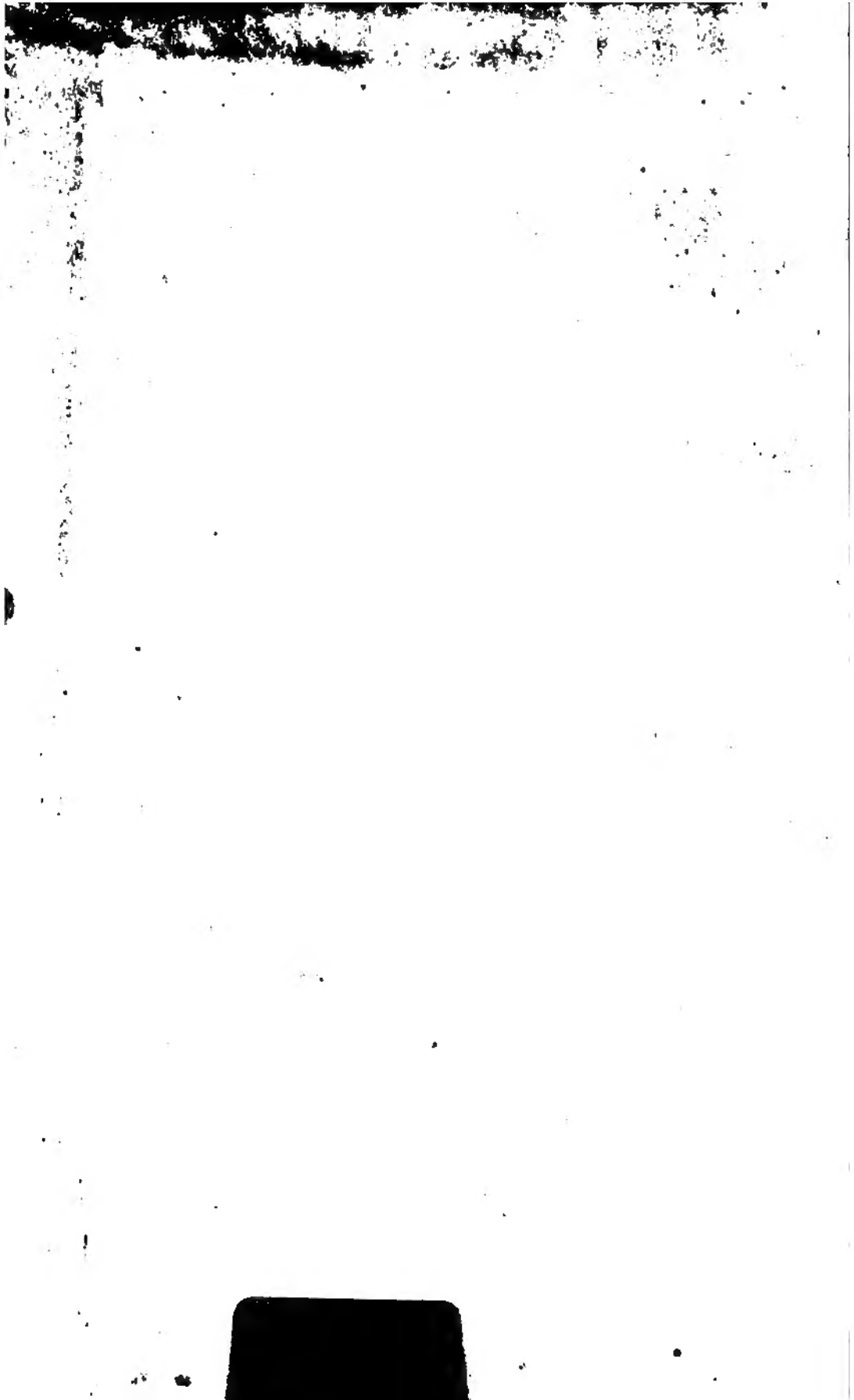
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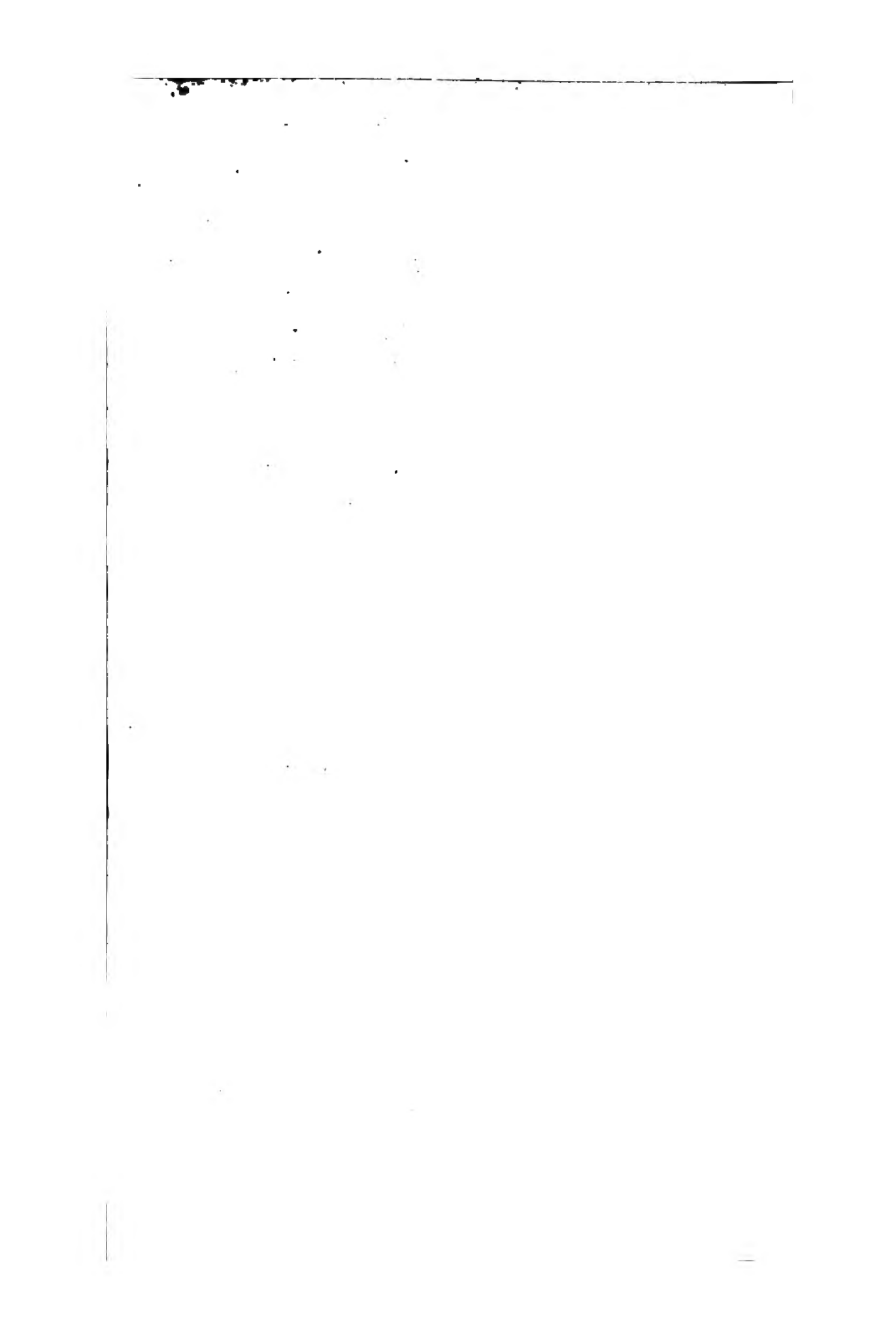
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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
ENGLISH COURT
OF
CHANCERY,
WITH NOTES AND REFERENCES
TO BOTH ENGLISH AND AMERICAN DECISIONS.

BY E. FITCH SMITH,
COUNSELLOR AT LAW.

VOL. XXI.
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1850.

REPORTS OF CASES
DECIDED IN THE
HIGH COURT OF CHANCERY,

BY THE
RIGHT HON. SIR J. L. KNIGHT BRUCE,
VICE-CHANCELLOR

~~~~~  
**BY EDWARD YOUNGE, OF THE MIDDLE TEMPLE, ESQ. AND**  
**JOHN COLLYER, OF LINCOLN'S INN, ESQ.**  
**BARRISTERS AT LAW.**  
~~~~~

WITH NOTES AND REFERENCES
TO BOTH ENGLISH AND AMERICAN DECISIONS.
BY E. FITCH SMITH,
COUNSELLOR AT LAW.

VOL. II.
MICHAELMAS TERM, 1842, TO HILARY TERM, 1844.

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**BANKS, GOULD & CO., LAW BOOKSELLERS:**  
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1850.

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REPORTS OF CASES
ARGUED AND DETERMINED IN
THE HIGH COURT OF CHANCERY,
COMMENCING IN
MICHAELMAS TERM, 6 VICT. 1842.

DELL v. HALE.

1842: Nov. 7th.

The 36th of the Orders of August, 1842, is not applicable to the case where there is something of a specific and particular nature in the bill which the demurrer has not covered.

THE bill alleged that the plaintiff and the defendant Hale had obtained a patent for making gun cases; that disputes having arisen between the parties they were desirous of dissolving their connection, and that after various previous conversations and discussions on the subject, a negotiation took place between the plaintiff and the defendant on the terms of such proposed dissolution. That in reference to this matter the defendant, on the 2d May, 1842, wrote and sent to the plaintiff a letter in the words and figures following, &c., and that in reply to such letter, the plaintiff on the same day wrote and sent to the defendant a letter which was as follows, &c. That the plaintiff having by the last-mentioned letter accepted the proposal contained in the defendant's letter for an assignment of his interest to the plaintiff and a dissolution of the partnership, the said two letters constituted a complete and valid contract and agreement binding upon both parties. The bill after charging that the patent was a good, valid, and subsisting patent, and that an assignment ought to be *made to the plaintiff of the defendant's share, pray- [*2] ed a declaration that the letters constituted in equity a complete, valid, and binding agreement between the parties, and

 1842.—Dell v. Hale.

that it ought to be decreed to be specifically performed; and for an assignment to the plaintiff of the defendant's interest, &c.

The defendant demurred to so much of the bill as required him to answer and set forth whether a negotiation did not take place between the plaintiff and the defendant, &c., [following the statements in the bill as before mentioned,] and for cause of demurrer showed that "the said alleged agreement in the said bill set forth is not a good and valid and complete agreement, and that the terms of such agreement are not sufficiently certain or capable of being sufficiently ascertained, and that the said letters in the said bill mentioned do not constitute a complete, valid and binding contract as between the plaintiff and this defendant;" and therefore, and for divers other causes of demurrer in the said bill contained, as to so much of the bill as was demurred to the defendant demanded the judgment of the court, &c. The defendant then answered the residue of the bill at great length, and in the course of his answer admitted having written the letter of the 2d May, 1842, but insisted that part of it was open to explanation, and that he had sought to give the explanation in a subsequent letter.

Mr. *Simpkinson* and Mr. *Wright* now appeared in support of the demurrer and answer.—The defendant being too late to file a demurrer alone has filed a demurrer and answer. The subject-matter of the demurrer might, it is true, have been applied to the whole bill, but that circumstance, though formerly an objection, (a)

is no longer so. By the 36th order of August, 1841, no demurrer shall be held bad and overruled upon argument, only because it shall not cover so much of the bill as it might by law have extended to. Here the defendant has demurred to part only of the relief, where he might have demurred to the whole; but as he has given a full and detailed answer to the residue of the bill, that is sufficient. *Hodgkin v. Longden*. (b) [The *Vice-Chancellor*.—He has not demurred to any part of the relief.]

(a) See *Dawson v. Sadler*, 1 Sim. & Stu. 537; and see Story, Eq. Pl. 302, n.

(b) 8 Ves. 2.

1842.—Dell v Hale.

Mr. *Kenyon Parker*, in support of the bill, referred to *Todd v. Gee*,(a) Dan. Ch. Pr. Vol. 2, p. 25.

The following cases were also referred to in the course of the argument: *Morgan v. Harris*,(b) *Tomkin v. Lethbridge*,(c) *Wetherhead v. Blackhorn*.(d)

THE VICE-CHANCELLOR.—It appears to me that the contention of the demurring defendant is not warranted either by the letter or the spirit of the 36th Order. The object of that Order was, I believe, to introduce this practice, that where there are several questions or matters in a bill, to all of which the demurrer might have extended, and the demurrer, through mistake or otherwise, does not extend to all of them, it is not to be overruled merely on that account. The Order does not say that in *no case* shall a demurrer be overruled, but that it shall not be overruled *only* because it does not cover so much of the bill as it might by law have extended to. In overruling this demurrer I shall do so, not merely because there is something which it has not but might have covered, but because there is something of a specific and particular nature which it has not covered. Previously to the new rules, though a defendant generally might demur to the relief, and give *discovery, yet if he [*4] did not question any part of the relief sought, a mere demurrer to discovery would be overruled, because it was considered a contradiction to admit the claim of the plaintiff to relief, and yet to exclude him from the means which the law allowed him of proving those facts which were essential to his case. Here the bill prays relief founded on certain letters. No part of the relief is demurred to. The demurrer is confined to the discovery of these letters without proof of which the plaintiff might have no case at the hearing. As the defendant could not before the new Orders so he cannot now file such a demurrer; and as it was put in at a time when it was not competent to him to demur to the whole bill, I think I ought not to give the defendant leave to amend.

Demurrer overruled.

(a) 17 Ves. 273. (b) 2 Bro. C. C. 124. (c) 9 Ves. 178. (d) 2 Ves. & B. 121.

1842.—Arkwright v. Colt.

ARKWRIGHT v. COLT.

1842: Nov. 8th.

A bill for an account of dilapidations was filed by the reversioner of a lease against the personal representatives of a person whose interest in the lease appeared to be that of equitable tenant for life, with remainders over, alleging that such person in his lifetime was in possession, during which time the dilapidations accrued, that he paid rent, and was liable to the covenants in the lease, and that on his death the defendant entered into possession as his administrator, paid rent, and became liable under the covenants:—*Held*, that there was not a sufficient allegation of debt to support the bill.

THE bill which was filed by the plaintiff on behalf of himself and all other the creditors of James Colt stated that by a lease dated the 5th August, 1760, Margaret Countess Conynsby demised certain water-mills with their appurtenances and meadows adjoining to James Bowman Clarke, his executors, administrators and assigns, from the 24th June, 1760, for ninety-nine years, if certain persons therein named, or any or either of them, so long lived, at the yearly rent and subject to the covenants therein reserved, amongst which were comprised covenants for putting the premises in repair within a given time, keeping them in repair during the term and delivering them up in repair at the expiration of the term. That J. B. Clarke entered into [*5] *possession of the premises so demised, and continued in such possession down to the time of his decease; that he died in 1776, having by his will,^(a) dated July in the same year, bequeathed the said leasehold premises to William Toldervy and Thomas Davies, their executors, administrators, trustees and assigns, upon trust, in case his daughter should marry with the consent of them or either of them, to convey the said premises so that the same should be settled upon trust only, and for the use of his said daughter and such husband as she should marry with such consent as aforesaid, during the joint lives and life of the survivor, with remainder to the use of the heirs of the body of his said daughter, in such manner and shares as the trustees should appoint. And the testator appointed the said trustees and his said daughter his executors. That W. Toldervy and

(a) See the will more fully stated, 1 Y. & C. 240.

1842.—Arkwright v. Colt.

T. Davies proved the testator's will. That by an indenture of lease and release and assignment dated the 30th November, 1782, and made between Toldervy and Davies of the first part, Mallet Clarke of the second part, and James Colt of the third part, being the marriage settlement of Mallet Clarke and James Colt, Toldervy and Davies, in consideration of the marriage, assigned the premises (the bill not stating to whom) upon trust, out of the rents, issues, and profits, to pay the rent so reserved in the said lease, and to observe and perform all the covenants therein contained on the part of the lessee, his executors, administrators and assigns, and subject thereto, to permit the said J. Colt and Mallet his intended wife, and the survivor of them, to receive the rents of the said premises, and after the decease of the survivor of them, upon trust for the children of the marriage as therein mentioned.^(a) *That the marriage was duly solemnized. [*6] That J. Colt entered into and continued in the beneficial ownership of the premises down to the time of his decease; that he died on the 30th August, 1832; and that letters of administration with the will annexed were granted to the defendant Sir J. D. Colt, who thereby became and was the sole legal representative of James Colt, and as such representative had possessed himself of personal estate of the said James Colt to a large amount.

The bill then stated that during the continuance of the lease, by indentures of lease and release executed in 1810, the hereditaments comprised in such lease were conveyed to the plaintiff, his heirs and assigns, and that by virtue of such conveyance, he became entitled to the reversion in fee expectant on the determination of the lease. That James Colt, from 1810, down to his death, duly paid to the plaintiff the rent reserved in such lease, and that he also became liable to the performance of the covenants comprised in the lease. That on the 16th December, 1832, the last surviving life named in the lease died; and that the lease thereby became determined. That during the continuance of the lease the premises were not kept in repair by James Bowman Clarke or James Colt according to the covenants, and were upon

^(a) The bill did not state more particularly the limitations subsequent to the life interest of Mr. and Mrs. Colt, nor whether there were any children of the marriage

 1842.—Arkwright v. Colt.

the decease of James Colt left in a state of great dilapidation. That on the decease of James Colt the said Sir J. D. Colt, *as his administrator*, with a copy of the will annexed, *entered into possession of the same several premises*, and paid the rent to the plaintiff down to December 16, 1832.

The bill, after charging that, by virtue of certain proceedings in a suit for the administration of the estate of James Colt, the defendant had rendered himself personally liable to pay the plaintiff and the other creditors of James Colt, prayed for an account of what was due to the plaintiff in respect of dilapidations [*7] of the said premises, or *otherwise, under the covenants of the lease, and also of what was due to the other unsatisfied creditors of James Colt, and for the usual accounts in a creditors' suit.

To this bill the defendant demurred for want of equity, and want of parties.

Mr. *Cooper* and Mr. *Rogers*, for the demurrer.

Mr. *Russell* and Mr. *Metcalf*, in support of the bill.—It is not necessary that the legal assignees of the lease or their representatives should be parties. In *Sainstry v. Grammer*,^(a) a case somewhat similar to the present, the pauper assignee was evidently not made a party. As to the equity of the case, though the plaintiff cannot show himself a legal creditor of the intestate, yet as the intestate was liable under the covenants, this bill is maintainable. [The *Vice-Chancellor*.—How was he liable under the covenants? You do not allege that he was assignee of the entire lease, but only that he was equitable tenant for life with remainders over.] The bill alleges that he was in possession, became liable, and that upon his death his administrator, as administrator, entered into possession and became liable: *Close v. Wilberforce*.^(b) Considering the allegations of the bill, it does not lie in the mouth of those who represent James Colt's estate to say that it was not an equitable assignment to him of the lease. He dealt with the premises in the character of equitable assignee and reaped the whole benefit of the lease. *Lucas v. Commer-*

(a) 2 Eq. Ca. Abr. 166. (b) 1 Beav. 112. See 3 Beav. 373; 4 Beav. 350.

1842.—Arkwright v. Colt.

ford.(a) [The *Vice-Chancellor*.—Did not the defendant in that case admit himself liable on the general covenants, though he took an objection to a particular covenant?][1]

THE VICE-CHANCELLOR.—I confess that the *opinion [*8] which I entertained at the commencement of the cause has not been displaced by the argument. I am not satisfied in this case that there is a sufficient allegation of any subsisting demand. Neither the late Mr. Colt nor Sir John Colt was ever in possession of the property as legal assignee, nor indeed is that attempted to be argued. The late Mr. Colt was equitable tenant for life of the benefit of the lease. It is stated that he entered, and I am willing to consider the statement in the bill as being that he entered in that character. I apprehend, however, that by his entering into possession in that character he did not become liable to the landlord, as assignee, in respect of the covenants in the lease. He dies, and it is stated that upon his death Sir John Colt entered as his administrator into possession; that must mean, claiming as his administrator. It is not suggested in the bill that he had any title. It is said that he paid rent to the plaintiff. His doing so would not create a continuing liability in him to pay rent or perform the covenants. It is true that there is a general allegation in the bill that he became liable to perform the covenants; but without a more particular statement of facts leading to that conclusion, the allegation is not sufficient. The bill does not state any case of legal or equitable demand either against Sir John Colt or the assets of the late Mr. Colt. The demurrer, therefore, must be allowed, but it is a case in which liberty should be given to amend.[2]

(a) 3 Bro. C. C. 166; 1 Ves. jun. 235; 8 Sim. 499.

[1] "In equity, a party takes upon himself a liability, when he places himself in a situation which subjects him to that liability." Shadwell, V. C. *Emmott v. Mitchell*, 14 Sim. 436.

[2] As to the liability of the equitable assignee of a lease, see *Robinson v. Rosher*, 1 Yo. & Coll. C. C. 11, and n. [1] *Ibid*. As to the liability of a legal assignee, and how it may be avoided, see *Rowley v. Adams*, 4 Myl. & Cr. 539, *et seq*; *Nouaille v. Flight*, 7 Beav. 526, 7.

 1842.—Skeats v. Skeats.

[*9]

***SKEATS v. SKEATS.**

1842: Nov. 8th and 9th.

One seised of a copyhold estate for the joint lives of himself and J. and the survivor, surrenders it to the lord, and takes a new grant for the joint lives of himself, J., and W., the surrenderor's son, and the longest liver of them: *Held*, under the circumstances of the case, that this was intended to be an advancement for W.

JOHN SKEATS, of Romsey, Hants, being seised to him and his heirs, according to the custom of the manor of Bagnor, in the county of Berks, of a messuage and two acres of land, holden for the lives of himself and his brother, James Skeats, and the life of the longer liver of them, in August, 1812, surrendered the same into the hands of the lord, who regranted to him seisin of the premises, to have and to hold the same to him, John Skeats, the before-named James Skeats, and William Skeats, the son of John Skeats, then aged about seven years, for the term of their natural lives, and the life of the longer liver of them successively, at the will of the lord, &c. Whereupon John Skeats paid a fine of ten guineas, and was duly admitted tenant by copy of the premises.

John Skeats, by his will, dated in September, 1838, (at which time he was about 80 years old,) after directing payment of his debts, devised his real estates (including, as the will stated, the messuages held of the manor of Bagnor for his the testator's own life, and the life of his son, William Skeats, who was nominated by him *as a trustee for his the testator's own use and benefit* when he the testator obtained the last grant of the premises, and *not for his the said William Skeats' own advancement*,) and all his personalty to the plaintiffs, their heirs, executors, and administrators, upon trust for his the testator's wife for her life, and, after her decease, upon trust to sell the same and divide the produce amongst so many of his children and grandchildren as should be then living in such parts and shares as the plaintiffs should think reasonable. And he appointed his sons, the plaintiffs, James and Joseph Skeats, his executors.

The testator died in November, 1838, having survived his brother, James Skeats, but leaving the plaintiffs and

[*10] *William Skeats, and some other children, surviving him.

1842.—*Skeats v. Skeats*.

It was stated at the bar, but this did not appear in evidence, that William Skeats was the youngest son of the testator.

Upon the death of the testator, William Skeats entered into possession of the property held of the manor of Bagnor.

The bill charged that the defendant, William Skeats, some time previous to the death of the testator, procured from the testator the copy of the testator's admittance to the premises under a promise to return the same; that he neglected to return the same; though repeatedly required so to do; and that, in consequence of this neglect, the testator had given one of the plaintiffs, Joseph Skeats, authority to proceed at law against the defendant for recovery of the document.

The bill prayed that the defendant might be declared a trustee of the premises for the plaintiffs, and might be decreed to surrender them accordingly.

The defendant, by his answer, stated, that at the age of nineteen he went to London, where he remained about nine years; that, at the expiration of that time (1833,) he went to visit his father, and that, upon that occasion, his father, after observing that the property would ultimately be his, gave him the copy admission. The defendant wholly denied that the document was given him under a promise to return it. He alleged that the transaction was intended by his father as an advancement to him, and insisted that such advancement could not be affected by the words of the will, supposing the will to be valid. He suggested, however, that the will had been made under undue influence.

At the hearing of the cause, evidence was given on the part of the plaintiffs of an application having been made by the testator to the plaintiff, Joseph Skeats, to procure from the defendant the restitution of the copy admission, *and of [*11] Joseph Skeats have accordingly requested the defendant to deliver up the same. No other circumstances, however, of any importance appeared from the depositions.

Mr. *Simpkinson* and Mr. *Parker*, for the plaintiffs.—It is admitted that James was a trustee for John and we contend that

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both James and William were trustees for John. It may be conceded, that if the name of James had not been used, a presumption would have arisen that the surrender and grant was an advancement for the son; but that presumption can hardly arise where the name of a stranger is interposed between that of the father and son. *Dyer v. Dyer*(a) does not go that length. [The *Vice-Chancellor*.—Supposing John had died, leaving James and William, for whom would James have been a trustee?] There is nothing to show that he would have been a trustee for William. No case goes so far. In *Crabb v. Crabb*(b) the banker was the agent for both son and father. The terms of the admission and surrender go far to show that it was the intention of John to reserve to himself the whole equitable interest. The conduct of John, subsequent to the transaction, is in conformity with the fact of his being absolute owner. [The *Vice-Chancellor*.—Are the subsequent acts of the father evidence?] We concede that the will(c) is not evidence, but may not the other acts of the father be admitted to rebut the presumption that he intended to give a beneficial interest?

Mr. *Goodeve*, for the defendant. [The *Vice-Chancellor*.—Is not the general custom in these cases that the first life has a right of surrendering for the whole three lives? The question is, whether the first life for the time being had not a right of disposition of the estate without the consent of the last life.] [*12] That must have existed in all the cases. It is submitted that that is a question involving only the devolution of the legal estate. The father makes a surrender, and takes a grant without taking to himself any further interest, but giving an interest to his son. That must be for the benefit of the son. If it were not so intended, he would have made a contemporaneous declaration to the contrary, or inserted the life of a stranger. *Sidmouth v. Sidmouth*,(d) *Mumma v. Mumma*,(e) *Murless v. Franklin*,(f) *Finch v. Finch*.(g)

Mr. *Simpkinson*, in reply.

(a) 2 Cox. 92. (b) 1 Myl. & K. 511. (c) See 15 Ves. 51. (d) 2 Beav. 447.
 (e) 2 Vern. 19. (f) 1 Swanst. 13. (g) 15 Ves. 43.

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Nov. 9th.—THE VICE-CHANCELLOR.—Before disposing of this case, I wished to read again *Dyer v. Dyer*, and some other of the decided cases. Having done so, I continue of opinion that the state of the authorities renders it impossible for me to decide against the defendant, whatever I may suspect to have been the real view and intention of his father in the transaction under which he claims. Evidence of intention beyond the assurance itself, and the relationship of the parties, there is none ; except, that if any weight is to be given to the possession of the copy of court roll, that is with the defendant. Were I to treat the introduction or continued use of the name of James Skeats, or the state in which, after the death of John Skeats the elder, if he had been survived both by James and by the defendant, the beneficial ownership of the property would probably have been during James's life, or the legal power over the whole estate which James might possibly have then had, as creating a material distinction in favor of the plaintiffs, I should, I think, be acting against the principle of authorities which have long been considered as declaring the law on this subject. I must, therefore, hold that the defendant being the son of John Skeats the elder, the *plaintiffs have failed in showing the defendant [*13] to be a trustee, and that the bill should consequently be dismissed, but without costs, and without prejudice to the question whether a case of election against the defendant is or is not created by his father's will, or to any proceedings at law which the plaintiffs may be advised to take.[1]

[1] In *Sidmouth v. Sidmouth*, 2 Beav. 447, Lord Langdale, M. R. has stated the doctrine of advancement with clearness and precision, but his remarks are confined to the mere natural relation of parent and child, without regard to the artificial relation of a person standing in *loco parentis*. See *Scawin v. Scawin*, 1 Yo. & Coll. C. C. 65. *Livingston v. Livingston*, 2 Johns. Ch. Rep. 539, 40. *Partridge v. Havens*, 10 Paige, 618. *Prankerd v. Prankerd*, 1 Sim. & Stu. 1. *Hill v. Gomme*, 1 Beav. 554. *Curant v. Jago*, (a case of one standing in *loco parentis*) 1 Collyer, 261. *Dunham v. Gates*, Hoff. C. Rep. 191.

1842.—Whitmore v. Oxborrow.

WHITMORE v. OXBORROW.[1]

1842: Nov. 8th.

A creditor having *debitum in solvendum in futuro* may maintain a creditors' bill.

Whether he can obtain a decree for immediate security must depend on circumstances.

In the year 1839, the plaintiff, who carried on business as a pawnbroker at Stockport, transferred that business to James Oxborrow. The consideration for the transfer was the sum of £800 cash, and £2952 secured by bills of exchange drawn by the plaintiff upon and accepted by Oxborrow, and made payable at succeeding intervals of six calendar months for the space of about nine years and a half. Oxborrow also executed to the plaintiff a bond and warrant of attorney. The bond, which was dated the 4th November, 1839, was conditioned to be void if Oxborrow, his heirs, executors, or administrators, should duly take up and pay the several bills as they should respectively become due and payable; provided always, that if default should be made by Oxborrow, his heirs, executors, or administrators, in payment of any of the bills, when the same should become due, and the same should not be paid by Oxborrow, his heirs, executors, or administrators, within twenty-four hours after demand of payment thereof by the plaintiff, his executors, administrators, or assigns, by writing, &c., then the whole of the said sum of £2952, the amount of the bills of exchange, or such part thereof as should then remain unpaid, should be deemed immediately payable, and should be recoverable and recovered by the plaintiff, his executors, administrators, or assigns, by virtue of the [*14] bond, but subject, in that case, to a rebate of *interest proportioned to the change in the period of paying the principal money then unpaid. The plaintiff on his part covenanted with Oxborrow that he would not directly or indirectly carry on the business of pawnbroker at Stockport, or within ten miles thereof, nor set up, make, or encourage any opposition to the said trade or business thereafter to be carried on by Oxborrow, his executors, administrators, and assigns, nor do any act, matter, or thing to the prejudice thereof.

[1] S. C. in a subsequent stage, and on a different point, 1 Collyer, 91.

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Immediately after the conclusion of this arrangement, James Oxborrow entered upon the business, and continued to carry it on till his death, which occurred in June, 1840. After that period, the business was carried on by his widow, the defendant, who was his administratrix.

The first bill of exchange became due in the lifetime of Oxborrow, and was paid by him. After his decease, the bills which became due previously to the filing of the defendant's answer, and for any thing that appeared to the contrary, up to the hearing of the cause, were paid by her.

The present suit, which was framed as a creditors' suit, was instituted for the purpose of having the remainder of the debt either paid to the plaintiff with a rebate of interest, or secured in Court. The bill prayed the usual accounts, an injunction to restrain the defendant from further interfering in the administration of the intestate's estate, and a receiver.

The principal allegations upon which this relief was sought, were, that the assets of the intestate at his death were not sufficient, or barely sufficient to pay his debts including the plaintiff's demand; that the defendant had paid divers simple contract creditors of the intestate without securing to the plaintiff or reserving out of the assets a sufficient sum to answer the amount of the bills, and that she had also out of the intestate's effects maintained herself, and otherwise applied considerable sums of money for her own use, and carried on the business at a loss and in an improvident manner. [*15]

The defendant, by her answer, denied that, on the decease of James Oxborrow, his estate and effects were insufficient or barely sufficient for the discharge of his debts; and she believed that such estate and effects were then and also at the time of filing her answer sufficient to pay and satisfy all his just debts including his liabilities to the plaintiff. She admitted that she had out of the testator's assets paid his funeral and administration expenses, and likewise the ordinary and current outgoings in the business, and that she had obtained her livelihood out of the profits made by carrying on the business, but from no other source. She stated in a schedule the value of the effects of the intestate come to her hands, but save as aforesaid, she could not

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answer as to the amount of assets come to her hands, or whether out of the intestate's effects she had or not maintained herself, or applied considerable sums of money to her own use. She denied the charges of improvidence and mismanagement, and stated her belief of being able to pay all the bills as they might become due, and all other the debts or liabilities to which the intestate's estate might be subject.

The cause now came on for hearing on bill and answer.

Mr. *Russell* and Mr. *Terrell*, for the plaintiff.—The defendant admits that she has paid simple contract creditors of the intestate, alleging as an excuse, that she has done so in order to carry on the business of the testator. But a debt on bond, though the bond be not yet due, takes place of all simple contract debts, for the obligation is the present duty and the condition is but the defeazance of it: *Williams on Executors*.(a) Hence if an action be brought against an executor on the simple contract of

his testator, he may plead that his testator entered into a [*16] bond payable *at a future day, and it shall cover assets to the amount of the sum payable by the condition: *Buckland v. Brooke*.(a) The defendant ought to have converted the whole of the assets immediately on the intestate's death, and after paying this and other specialty debts, invested the residue in consols. The whole course of dealing by the defendant with the intestate's assets has been an uninterrupted *devastavit*. She had no right to apply any part of them to her own use or to carry on the trade. The plaintiff therefore has a right to stop the dealing with those assets in an improper manner. Every creditor who shows that a *devastavit* has been committed, though he has in strictness no lien on the assets, has a right to have the assets secured. The circumstance that the debt is not immediately payable is immaterial. If a simple contract creditor were to file a bill, he could receive nothing till every farthing of the instalments were paid.

Mr. *Koe* and Mr. *Mylne*, for the defendant.—If the bills of exchange are paid, the bond does not come into operation. Until

(a) Vol. 2, 744, (2nd ed.) 818, 3rd ed.

(b) Cro. Eliz. 315.

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default in payment of the bills, the debt remains a simple contract debt; and it has been expressly held that though a bond is in existence, yet if it be not payable, an executor is entitled to be allowed payments made by him to the simple contract creditors of his testator: *Norman v. Baldry*.^(a) [The Vice-Chancellor referred to *Read v. Blunt*.^(b)] In this case there has been no proof of misapplication of assets. The carrying on the trade was no *devastavit*. The contract was made with an express view to the payment of the consideration money out of the profits. The plaintiff asks for a mode of payment which the parties never contemplated. Why should this Court give a better security than he contracted for? Besides, he has no right to file a bill for an account. The right to file *such a bill [*17] is incidental to the right of immediate payment: *Flight v. Cook*.^(c) In that case, relief, it is true, was given, but on the ground of special lien. Here, the plaintiff has by his own contract excluded himself from any such claim. He expressly covenants that he will not interfere in the business.

Mr. Russell, in the course of his reply, observed, that in *Norman v. Baldry* no distinction appeared to have been made between debts certainly payable, and debts contingently payable.

During the argument the Vice-Chancellor asked the defendants' counsel whether their client would admit assets sufficient to pay the plaintiff's debt. To this question, however, no distinct answer was given.

THE VICE-CHANCELLOR.—I am of opinion that, at least in a case where assets are not admitted, a creditor of the deceased, whose debt is not payable *in presenti*, but payable *in futuro*, may file a bill against the personal representative of the deceased in respect of such interest as the creditor has in the assets, that is to say, a creditors' bill. Whether any special decree should be made on such a bill must depend on circumstances.

In the present case, no act of malversation in an immoral sense has been brought home to the personal representative. It is possible (upon that I give no opinion) that some payments may

(a) 6 Sim. 621.

(b) 5 Sim. 567.

(c) 2 Ves. sen. 619

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appear to have been made which in strictness ought not to have been made, or that, considering the situation of affairs at the intestate's death, his trade ought not to have been carried on. But the circumstances are not such as to render it proper at
 [*18] present *to appoint a receiver, or to direct an account of the profits of the trade. *Richardson v. Smallwood, Jac.* 522.

LET the Master take an account of what, if anything, is due and to become due to the plaintiff by virtue of the bond and bills of exchange in the pleadings mentioned, or any of them. Take the ordinary account in a creditors' suit against the personal representative of the intestate, giving the defendant liberty to apply to the Court to stay or suspend the taking of that account in case she shall admit assets. Let the Master inquire and state what it will be fit and proper and for the benefit of the persons interested should be done with respect to the trade and business of the testator and the stock employed therein, and let the Master be at liberty to state any special circumstances with respect to the past conduct of the defendant in respect of the trade since the testator's death, if the Master shall so think fit, and otherwise. And if anything with respect to the future conduct of the defendant in respect of the trade or assets shall arise which the plaintiff shall be advised is such as to render an application to the Court necessary, let him be at liberty to apply to the Court in respect thereof: the defendant undertaking, without prejudice to any question, that, as long as she shall carry on the trade, she will carry it on in a proper manner. Liberty to apply generally. Reserve further directions and costs. Reserve any question as to profit and loss made or to be made, in carrying on the trade since the testator's death.

HOLDICH V. HOLDICH.

1842: Nov. 9th

Held, that a widow was not bound to elect between the benefits given to her by her husband's will (including an annuity charged upon his real estate) and dower.

JOHN HOLDICH, of Elton, in the county of Huntingdon, by his will devised as follows:—First, I direct all my just debts, funeral and testamentary expenses, to be fully paid and satisfied, and after payment thereof, I give and bequeath unto my dear wife, Mary Holdich, a clear annuity or yearly sum of £50 of lawful money of Great Britain, for and during the term of her natural life; and from and immediately after her decease, I order and direct that the said annuity shall sink into and form part of my

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residuary estate. I also hereby give permission to my said wife to continue to reside in the house wherein we now live, and *to have the free use of the household goods and [*19] furniture that may be on the said premises at the time of my decease, for and during the term of her natural life, if she should so long continue my widow and unmarried; and from and after her decease or marrying again, whichever shall first happen, I do hereby direct the same shall also sink into and form part of my residuary estate. I give and bequeath unto my daughters, Mary Ann, Margaret, Jane, and Fanny Holdich the sum of £500 each of lawful money of Great Britain. And I hereby order and direct my executor, hereinafter named, to pay to my said daughters their respective legacies of £500, as they shall respectively attain the age of twenty-one years; but in case my youngest daughter shall have attained such age previous to my decease, then and in that case I direct that the said legacies shall be paid within twelve months after my decease; and in the event of any or either of my said daughters dying during her or their minority, then I direct the share or shares of her or them so dying shall sink into and form part of my residuary estate. As respects my eldest daughter Elizabeth (the wife of John Bailey,) I have already given her the sum of £500 as a marriage portion; but to show I have not forgotten her, I bequeath her the sum of 19 guineas. And subject to the payment of such annuity and bequests hereinbefore mentioned, I hereby give, devise, and bequeath all that my freehold estate and premises, with the appurtenances thereto belonging, situate, lying, and being in the parish of Elton in the county aforesaid, and all the rest, residue, and remainder of my real and personal estate and effects, whatsoever and wheresoever, either in possession, reversion, remainder, or expectancy to my son John Holdich, to hold to him my said son John Holdich, his heirs and assigns for ever. And I hereby nominate, constitute, and appoint him sole executor of this my will; hereby revoking and making void all former wills by me at any time heretofore made. *The [*20] testator died, leaving John Holdich his heir at law.

The bill was filed by Mary Holdich against John Holdich, claiming dower out of the testator's freehold estates, the annuity

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of £50 for her life, and the use of the house during her widowhood. The question was, whether she should elect between the dower and the benefits given her by the will.

Mr. *Anderdon* and Mr. *Bartrum*, for the plaintiff.—The bequests to the widow not being inconsistent with her claim to dower, she is entitled to both: *Dowson v. Bell*.^(a) It will probably be contended on the other side, that if the widow takes her dower, the residuary real and personal property after payment of debts, will not be sufficient to meet the annuity and legacies; but upon that point the observations of Lord *Redesdale* in *Birmingham v. Kirwan*,^(b) apply. For the purposes of this suit it is enough to show that, at the time of making the will, the testator contemplated that the estate would be sufficient.

Mr. *Cooper* and Mr. *W. H. Smith*, for the defendant.—Where an annuity is charged upon real estate, and the amount, as is probably the case here, is larger than the dower, the annuity is inconsistent with the dower, and the widow is put to her election. Again, in the present case, a house is given to the widow specifically, and during her widowhood, and that is not consistent with the claim of dower. Then, “subject to the payment of the annuity and bequests,” there is a devise of real estate by name (for there is no residuary real estate) to the son. That shows an intention on the part of the testator, that the son should take the entire property subject only to the wife’s annuity her enjoyment of the house, and the legacies. The Court, however
[*21] will not put a construction on the will until it “has ascertained the state of the property. It will assist itself by an inquiry as to the value of the real estate, as in some cases it will as to the amount of the general property, with a view of ascertaining whether the intention of the testator will be defeated by giving the widow both her demands. Here the legatees will be unpaid if the plaintiff succeeds.

Upon the general question the following cases are in favor of the defendant:—*Lawrence v. Lawrence*,^(a) *Villa real v. Lord Galway*,^(b) *Arnold v. Kempstead*,^(c) *Wake v. Wake*,^(d) *Miall*

(a) 1 Keene, 761.

(b) 2 Sch. & Lef. 454.

(c) 2 Vern. 365.

(d) Ambl. 682.

(e) 2 Eden, 236.

(f) 1 Ves. jun. 335.

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v. *Brain*,^(a) *Butcher v. Kemp*,^(b) *Roadley v. Dixon*,^(c) *Pearson v. Pearson*,^(d) *French v. Davies*,^(e) *Foster v. Cook*,^(f) *Hall v. Hill*,^(g) (in which case it is submitted that the decision proceeded on the whole will taken together, and not on the power of leasing only,) *Daly v. Lynch*.^(h) With respect to the reference as to the value of the property, *Pearson v. Pearson*, *Arnold v. Kempstead*, *Greator v. Cary*,⁽ⁱ⁾ and *Strahan v. Sutton*,^(j) are in point. [The Vice-Chancellor intimated that he should direct no reference.]

THE VICE-CHANCELLOR.—I feel bound by the present state of the authorities to say, that a mere gift of an annuity to the testator's widow, although charged on all the testator's property, is not sufficient to put her to her election. I consider myself equally bound by the authorities to say, that a mere gift to the widow of an annuity so charged, and a gift of the whole of the testator's real estate, though specified by name, to some [*22] other person, are not together of themselves sufficient to put the widow to her election: and moreover, that a gift of a portion of the real estate to the widow, whether for life or during widowhood, is not sufficient, as to the residue of the estate, to put the widow to her election in respect of dower.[1] Whether

(a) 4 Madd. 119. (b) 5 Madd. 61. (c) 3 Russ. 192. (d) 1 Bro. C. C. 292.
(e) 2 Ves. jun. 576. (f) 3 Br. C. C. 347. (g) 1 D. & W. 94; 1 Con. & L. 120.
(h) 3 Br. P. C. 478; ed. Toml. (i) 6 Ves. 615. (j) 3 Ves. 249.

[1] In *Dowson v. Bell*, 1 Keen, 761, (cited by counsel in the above case,) a testator devised all and singular the rents, issues and profits of his copyhold lands to be applied to the maintenance of his children, until the youngest should have attained twenty-one, subject in the meantime and charged with an annuity to his wife, so long as she should continue his widow, and upon his youngest child attaining twenty-one, he devised all and singular his said copyhold lands among all his children equally; and he devised all and singular his freehold titles and lands upon the same trusts as he had declared respecting his copyhold estates, subject to the annuity to his wife; and he bequeathed the use of all his household goods and furniture to his wife, so long as she should continue his widow: It was held, that the wife was entitled both to the benefits given by the will, and to her dower. So, in *Harrison v. Harrison*, the next case in the same book, (p. 765.) a testator gave all his farms, lands estates and hereditaments, and all other his real estates upon trust, to receive the rents and profits, and pay to his wife during her life, in case she should continue his widow, the sum of £200; and out of the same rents and profits, to maintain and educate his son during his minority, and to place the surplus of the same rents and profits, out at interest till his

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my opinion would be so if the matter were *res integra*, it is not necessary to say.[2]

It is clear, therefore, that the annuity here does not bar the wife of her dower.[3] The testator, however, has given her his house (which is admitted to be freehold) during her widowhood, and, after her marrying again, he directs that the same, that is the house, shall fall into and form part of the residuary estate. Now, if the testator had pointed to a particular mode of using and enjoying the house, as one entire thing, after the widow's second marriage, it might be possibly right to hold that the will contained a declaration, as in *Roadley v. Dixon*, that she should not marry again, and also claim her dower; because, by so doing, she would disappoint the intention of the testator, that the property should be used and enjoyed in a particular way. The testator, however, has not done that. He has only directed that, upon her marriage, the house shall fall into the residue—not directing a particular mode of enjoying it. So as to the Elton property; though it is a residuary gift of the whole real estate which the testator had, still it is a mere gift of the subject itself, without any specification of the particular mode of enjoying it.[4] Therefore it falls within one of the rules which I

son should attain twenty-one, and when his son should attain twenty-one to pay him the accumulations, and let him into possession of all his said real estates, subject to the annuity to the widow: It was held, that the testator's widow was entitled both to the annuity, and to her dower out of the devised estates. Where a testator devised all his property real and personal to his wife and two other persons, to be kept for her use and support so long as she should continue his widow, and until his youngest child should become of age, and then directed that all his property should be divided equally among his children; and after the death of the testator she married again: It was held, that the devise in her favor was not inconsistent with her claim of dower in the testator's real estate, after his youngest child arrived at the age of twenty-one, and that her acceptance of the devise was no bar to such claim of dower. *Sanford v. Jackson*, 10 Paige, 268.

[2] In *Hall v. Hill*, cited in the text, Lord Chancellor Sugden throws out a strong hint of dissatisfaction with the established rule, that an annuity and dower are not inconsistent.

[3] *Sanford v. Jackson*, 10 Paige 269.

[4] The mere circumstance that the gifts to the wife exceed the value of what she would be entitled to as her dower, is not sufficient to put her to an election. *Havens v. Havens*, 1 Sand. Ch. Rep. 324.

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mentioned in the outset. In *Roadley v. Dixon*, and *Hall v. Hill*, the decisions, in both of which I entirely agree, proceeded on the ground of distinction to which I have adverted. The decision in *Roadley v. Dixon* turned on the mode of managing a farm, that in *Hall v. Hill* on the power of leasing, both of which, though clearly within the contemplation *of the [*23] testator, would be substantially disappointed by the claim of dower. To put the wife to her election on the ground that her claim to dower is inconsistent with the intention of the testator as to some other legatee or devisee, there must be something beyond the mere gift to the legatee or devisee. There must be such circumstances attending the gift as that, if dower be admitted, the legatee or devisee will be disappointed of the enjoyment of the property in the mode pointed out by the testator. No such circumstances occur in this case. Therefore I consider myself bound by the authorities to say, that this will does not exhibit an intention to exclude the wife from dower, to which she is *prima facie* entitled.[5]

[5] Where the testator in terms declares, that the provision made in favor of the wife is in lieu of dower, if she accepts the provision, she cannot have her dower in the testator's estate also. But to bar her of dower by implication, where the testator has not in terms declared his intention on the subject, by his will, the provisions of the will or some of them must be absolutely inconsistent with her claim of dower; so that the intention of the testator will be defeated, as to some part of the property devised or bequeathed to others, if she takes her dower as well as the provision made for her in the will. And to deprive the wife of her dower, or to compel her to elect, it is not sufficient that the provisions of the will render it doubtful whether the testator intended she should have her dower, in addition to the provision made for her by the will; but the terms and provisions of the will must be such as to show an evident intention, on the part of the testator, to exclude the claim of dower." Walworth, Ch. *Sanford v. Jackson*, 10 Paige, 266, 8, 9. By a deed of separation between husband and wife, (which although it might be voluntary as regards creditors, yet under the circumstances was binding on the husband,) the husband conveyed a fee simple estate to trustees upon trust, out of the rents to pay an annuity to his wife, and the residue to himself and his heirs: it was held, that the wife who survived the husband, was not bound to elect between the annuity and her dower. Lord Plunket, Ch. "It was argued that the deed by which the annuities are granted, would be defeated by giving her dower; the authorities that have been cited, are all cases of bounty, and the grounds on which they were decided rested merely on the supposed intention of the parties giving that bounty. But the principle of those cases is not applicable to cases of contract; in the one case you have merely to look to the intention of the dower, but in the other you are to look to the intention of the purchaser, to be collected from the terms of the in-

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I have already said that I think it immaterial to direct any inquiry with respect to the value of the property. Whether it could in my opinion be right in any case of this kind to direct such an inquiry, I do not say. In this case annuities, as well as legacies, are charged upon all the property. The will was made in 1829, and the testator lived to 1836; and whatever may have been the value of the property at his death, whether sufficient or not, the state or value of the property at that time can make no difference as to the point which I have to decide.

DECLARE the widow entitled to the annuity for her life, and to the house during her widowhood, and also to her dower out of the rest of the real estate of which she is dowable. Reserve the question, whether, if she marry again, she will be entitled to dower from that time of the house.

[*24]

*BRANDON V. ASTON.

1842: Nov. 14th.

Testator bequeathed an annuity to his nephew for life, declaring that his nephew should have no power to sell, mortgage, incumber, or anticipate it, and that, in case he should attempt so to do, the same should cease and be no longer payable to him. And after the decease of his nephew, or any such attempt to sell, mortgage, incumber, or anticipate the annuity, the testator ordered the fund out of which the annuity, was to be paid to be divided amongst his nephew's children. The nephew took the benefit of the stat. 1 & 2 Vict. c. 110, for the relief of insolvent debtors:—*Held*, that this was a forfeiture of the annuity, and that the children were entitled to the fund.

LEWIS COHEN, by his will, gave and bequeathed to certain persons named in his will one annuity or clear yearly sum of £50, to be paid by half-yearly payments on certain days named, upon trust during the life of the testator's nephew, Isaac Nathan, to pay the same to him the said Isaac Nathan, when and as the same should become due for his own use and benefit, the first payment of the annuity to begin and be made on such of the

strument containing the contract. All the cases cited differ from the present case in that essential particular." *Hill v. Hensworth*, Lloyd & G. t Plunk. 87, 92. In *Taylor v. Taylor*, 1 Yo. & Coll. C. C. 727, the widow was put to an election. See the editor's note, Ibid. 731, where a number of authorities on the subject are referred to.

1842.—*Brandon v. Aston*.

said days as should first happen after his the said testator's decease. And the testator willed and directed that a proper fund should be appropriated to answer and pay the said annuity. And he declared that the said Isaac Nathan should have no power to sell, mortgage, incumber, or anticipate the payment of the said annuity, and that in case he should attempt so to do, the same should cease and be no longer payable to him; and from and immediately after the decease of his said nephew, Isaac Nathan, or from and immediately after any such attempt to sell, mortgage, incumber, or anticipate the said annuity, the testator ordered and directed that his said trustees, or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, should pay, transfer, and divide the capital, stocks, and funds, in or upon which the said annuity should be invested unto, between, and amongst such and so many of the children of the said Isaac Nathan, lawfully begotten, as being sons or a son, should live to attain their or his age or respective ages of 21 years, or being a daughter or daughters, should live to attain that age, or be married, in equal shares and proportions; such shares to be payable and transferable to such children immediately upon their attaining 21, or being married, if the same should happen after the decease of him the said Isaac Nathan, and in case he should be then living, to be a vested and transmissible *interest in such children or child as being [*25] sons or a son, should attain the age of 21 years, or being daughters or a daughter should attain that age, or be married during the lifetime of the said Isaac Nathan, and should be paid, transferred, and assigned to them, him, or her, their, his, or her executors, administrators, or assigns, immediately on the death of him the said Isaac Nathan; and in case there should be but one such child &c., then the testator directed that the whole of the said stocks, funds, or securities should be transferred, paid, and assigned to such one child, his or her executors, &c., absolutely; and the testator appointed the trustees to be executors of his will.

The testator died in February 1823, leaving Isaac Nathan and the several other persons named in his will surviving him. Isaac Nathan had a daughter and two sons.

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The executors duly proved the testator's will, and set apart a sufficient portion of his personal estate to answer the annuity. The sum set apart was invested in the purchase of £1666 consols, and the executors regularly paid the annuity to Isaac Nathan to the 29th September, 1841.

On the 4th October, 1841, Issac Nathan was taken in execution for debt upon a writ of *ca. sa.*, and was confined within the walls of Whitecross-street prison.

On the 18th of the same month, being in actual custody within the walls of that prison, he presented his petition to the Court for the Relief of Insolvent Debtors, under the statute 1 & 2 *Vict.* c. 110, thereby stating that he was willing that all his real and personal estate should be vested in the provisional assignee according to the provisions of the statute, and praying to be discharged. The petition was afterwards duly filed and the usual vesting order made.

In the schedule, which was subsequently filed by the [*26] *insolvent, he described the annuity as being payable to him during his life, but which he could not sell, mortgage, or incumber.

Claims having been made to the annuity by the creditors' assignee of the insolvent on the one hand, and the children of Isaac Nathan on the other, the present bill was filed by the trustees against the assignee and the children, for the purpose of having the rights and interests of the defendants in the annuity and £1666 consols ascertained and declared.

The defendants insisted upon their respective claims by their answers.

Mr. *Lowndes* and Mr. *Faber*, for the plaintiffs.

Mr. *Russell* and Mr. *Goldsmid*, for the defendants, the children.—If insolvency be considered as an involuntary act of alienation, there are several authorities to show that such alienation is nevertheless a forfeiture under circumstances similar to the present: *Cooper v. Wyatt*,(a) *Dommett v. Bedford*.(b) The cases of *Pym v. Lockyer*.(c) and *Lear v. Leggett*.(d) differ from the others in principle. The present case, however, pro-

(a) 5 Madd. 482. (b) 3 Ves. 149. (c) 20 Law J. 8. (d) 2 Sim. 479 ; 1 Russ. & M. 690.

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ceeds on stronger grounds. Here the alienation was the voluntary act of the insolvent, and the principles of *Shee v. Hale*(a) distinctly apply. The words of the will are "sell, mortgage, incur, or anticipate." To anticipate is to do any act whereby you obtain beforehand the benefit of the property in question. Here the insolvent presents his petition, whereby he in effect says—take all my real and personal estate, and give me liberty. Is there any distinction between a proceeding *of [*27] this nature, and a sale and conveyance by deed for a valuable consideration?

Mr. *Bacon*, for the defendant, the assignee.—In all the cases the words of the will have directed the judgment of the Court: and the question here is, whether this is an attempt to sell, &c. within the meaning of the will. The case of *Shee v. Hale* was decided upon the words of the will. There the annuity was inserted in the schedule delivered in and signed by the insolvent. By the statute 41 *Geo. 3*, c. 70,(b) upon which that case was decided, the insolvent was required in his petition to state that he had no property other than that which he had stated in his schedule, and the schedule and declaration on oath were one instrument, filed in the Court in which the petition was presented. The *Master of the Rolls* was of opinion that in taking the benefit of that act the son did the very thing which the will provided against, namely, authorize and empower others to receive the annuity. Under the modern act, the mere filing the petition vests the whole property of the petitioner in the provisional assignee. [The *Vice-Chancellor*.—The petition is the wilful act of the insolvent.] Assuming it to be so, the question is, whether it is an attempt within the words of the will. When he files his schedule he gives notice to all the assignees, not only that he does not attempt, but that he has not the power to mortgage or incur the annuity. He tells them he has no title. It is true that by his petition he in the first instance makes a submission to the Insolvent Debtors' Court, that the law shall operate on his effects; but when he comes before the Court, he says that there is certain property which is nominally his, but which he has no

(a) 13 *Ves.* 404.(b) Re-enacted by the stat 44 *Geo. 3*, c. 108.

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power to assign. That property vests in the assignee, [*28] not by *the act of the insolvent, but by force of the statute.

[The *Vice-Chancellor*.—It seems to be agreed that the absent insolvent has no title.] Upon that there is no question. As to the authorities, it is submitted that this case is like *Lear v. Leggett*, where the restriction against alienation was not immediately followed by words importing forfeiture, and where therefore the assignee was held entitled. *Cooper v. Wyatt* is not inconsistent with that case. *Pym v. Lockyer* was special in its circumstances. [The *Vice-Chancellor*.—In *Cooper v. Wyatt* it was probably considered that there was a defective specification by the testator of all the means of forfeiture. In *Lear v. Leggett* it was not so considered.]

THE VICE-CHANCELLOR.—It is not necessary, if it would be right, for me to express any opinion on the respective decisions in *Lear v. Leggett*, and *Pym v. Lockyer*. The judgment, which I feel myself bound to give in this case, may well stand consistently with those decisions.

I apprehend that the words “attempt so to do,” meaning “attempt to sell, mortgage, incumber, or anticipate the payment of the said annuity,” are not too vague or indefinite, and that, under this will, there may have been an act amounting to an attempt to sell, mortgage, incumber, or anticipate, which would make the annuity cease as to the insolvent, and give the fund to his children. The question is, whether there has been such an act.

Now it is possible that there may be a case of insolvency which would not fall within the terms of this will. The present case, however, is one, if I may use the expression, of voluntary insolvency. It is the case of an application by a person for delivery from imprisonment upon certain conditions: it is his own act. He presents a petition to the Court for relief of Insolvent

Debtors, stating his imprisonment, and that he is willing [*29] that all his real and *personal estate and effects may be vested according to the provisions of the act of Parliament. By so doing, he has, in effect, executed a parliamentary power; that is, he has voluntarily elected to do that act which,

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being done, brings the provisions of the act of Parliament into operation. In effect, therefore, the vesting order is procured by himself: for every substantial purpose it is his own act. I apprehend I should be deciding against the letter and spirit of this enactment if I were to hold that there has not been a clear attempt to incumber and anticipate payment of the annuity. If that is so, the assignee has no interest, because the children are entitled.

It is unnecessary for me to enter into the question (if question it be,) whether the insolvent could contend that, having regard to the will, the petition, the vesting order, and the schedule, taken together, the vesting order ought to be considered as not intended to pass or affect this particular interest, and therefore as leaving it in him, notwithstanding his insolvency. As it is not necessary to decide that question, I neither encourage nor discourage any notion founded upon it, or intimate any opinion either against or in favor of it. In either view of the case, according to my judgment, the assignee under the Insolvent Act has no title, and I therefore declare that he has no title to this annuity.[1] The question of costs may be fit matter for argument.

[1] A testator after giving several annuities, begged it to be understood that if any of his annuitants should *attempt to sell or dispose of* their interest in his annuities to them (which he wished only for their peculiar and particular benefit,) from that moment his bequest to them was to terminate forever, and the principal and interest of each bequest to revert to his general fund. One of the annuitants *petitioned for* the benefit of the Insolvent Debtors Act, having entered the annuity in his schedule, together with the effect of the clause in the will above mentioned, and afterwards the usual vesting order was made by the Insolvent Debtors Court. It was held that his annuity ceased on his presenting his petition. *Martin v. Margham*, (July 1844) 14 Sim. 230. A testator gave the dividends of certain stock to A. for life, then to A's wife for life, and then the stock to be sold when the youngest child of A. becomes of age, and the money to be divided equally among such of the children of A. as should be living; but "no one of the said children shall be allowed or shall ever sell or part with his or her share or interest in this said money, until it shall be divided. If on proof of any one or more of them having done so, then his or her share will from that time become the property of the other children." The youngest child of A. came of age in 1844. In 1841, J. another of the children of A. having been arrested for debt presented his petition and obtained his discharge under the Act for the relief of Insolvent Debtors: It was held that this was a "*parting with*" J's contingent reversionary interest in the capital stock within the meaning of the expression con-

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Mr. *Bacon* then addressed the court on the question of costs.

THE VICE-CHANCELLOR said, that as the bill was filed by trustees to settle the conflicting claims of the assignee and other parties, and as the assignee would probably have his costs out of the insolvent's estate, he should be allowed no costs in this suit.[2]

[*30] *DECLARE the assignee not entitled to the annuity. Dismiss the bill against him without costs.

1843: April 20th.

Bequest of a personal fund to such of the children of J. N. as should live to attain the age of 21 years. J. N. had three children, two of whom having attained 21 applied for payment of their shares. Under the circumstances of the case the Court declined to pay over to them any part of the capital, but allowed them to receive the interest of two-thirds without prejudice to the claim of after-born children of J. N.

THE cause now came on for hearing for further directions. The Master having reported that two of the children of Isaac Nathan were of age, the question was, whether, upon the construction of the will, they were entitled to have their shares of the fund (now in court) paid to them immediately.

Mr. *Wigram* and Mr. *Faber*, for the plaintiffs, observed that

tained in the will, and further that the restraint contained in the will against alienation was valid. Knight Bruce, V. C. "The language of the will of James Churchill is more brief and restricted than that which I had to construe in *Brandon v. Aston*, But I remain of opinion, that by means of the petition presented by the insolvent, the vesting order upon it, and his discharge so procured, he "parted with" his interest, if any, under the will, within the meaning of that expression contained in it.—I repeat I do not consider *Brandon v. Aston* to have been wrongly decided." *Churchill v. Marks*, (November 1844) 1 Collyer, 441, 6, 7. If in cases of this description there is so disposition of the property in case of attempted alienation, the annuitant or legatee will take it free from the restriction, and it pass to his assignee under a bankrupt or insolvent law. 2 Story's Eq. § 974, a. And see *Yarnold v. Moorhouse*, 1 Russ. & M. 364. *Green v. Spicer*, Id. 395. *Hallett v. Thompson*, 5 Paige, 383. *Whitfield, v. Prickett*, 2 Keen, 608. *Graves v. Dolphin*, 1 Sim. 66. *Lewes v. Lewes*, 6 Sim. 304.

[2] So, in *Churchill v. Marks*, 1 Collyer, 448, (cited in the preceding note) the Vice Chancellor refused to make any order as to the assignee's costs. And see *Rider v. Jones*, post, 329.

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Bullock v. Stones(a) was the only case in favor of paying the shares immediately.

Mr. *Ruseell*, for the adult children, cited *Shepherd v. Ingram*,(b) *Mills v. Norris*,(c) and *Scott v. Earl of Scarborough*,(d) contending that after-born children were not entitled. [The *Vice-Chancellor*.—The rule recognized in the case of *Whitbread v. Lord St. John*(e) as to after-born children is artificial, and I think only to be adopted when necessity requires. Lord *Eldon* in cases coming very near it, but distinguishable from it, held after-born children to be entitled.][1]

THE VICE-CHANCELLOR said, that he considered the case so circumstanced as to justify him at present in withholding the capital from the adult children. He should, however, allow them the interest of their shares, which, if not otherwise right, might be supported by analogy to the course frequently taken by the Court as to maintenance.

*LET one-third of the dividends of the fund in Court be paid to one of the [*31] adult children, one other third to the other, and let the remaining third be carried to the account of the contingent share of the infant, without prejudice to any claim which after-born children of the father may have, and without prejudice to any claim which the insolvent may have.

TEED V. CARRUTHERS.

1842: Nov. 9th, 12th.

On the 2nd of May, 1837, freehold and copyhold estates were mortgaged by C. to T., subject to a proviso for redemption on payment of 10,000*l.* on the 2nd of May, 1844, with interest half-yearly in mean time. Prior to any default, C. paid to T.

(a) 2 Ves. sen. 51.

(b) Ambl. 448.

(c) 5 Ves. 338.

(d) 1 Beav. 154.

(e) 10 Ves. 152.

[1] As to vested interests liable to be divested on the happening of a contingency, or to open in order to let in after-born children, see *Kimberly v. Tew*, 2 Conn. & Law. 366. *McDonald v. Brice*, 2 Keen, 284. *Nodine v. Greenfield*, 7 Paige, 544. *Ellis v. Maxwell*, 3 Beav. 587. *Nayler v. Wetherell*, 4 Sim. 114, 19. *Boughton v. James*, 1 Collyer, 26, 42. *Martin v. Glover*, Id. 269, 72. *Salisbury v. Petty*, 3 Hare, 86, 93.

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7000*l.* by cheque, and gave him two bills of exchange, drawn by C. & Co., upon and accepted by C., for 1620*l.*, at three months after date, and for 1500*l.* at six months after date, being together the total amount of the mortgage debt and interest. Upon the receipt of the cheque and two acceptances, T. signed the following memorandum:—"London, 23rd December 1839—Received this day of C., the sum of 7000*l.* in cash, and two bills of exchange, as under, for 3120*l.*, drawn by C. & Co. of M., upon and accepted by the said C., one dated 16th December, for 1620*l.*, the other dated the 23rd of December, for 1500*l.*, and which cheque for 7000*l.* and bills for 3120*l.*, making together 10,120*l.*, are in full of principal and interest due to me upon a mortgage of C.'s freehold property in K. and S. for 10,000*l.*, and I do hereby undertake whenever required, to execute a conveyance of the said property. (Signed) T." T. gave this memorandum together with the title and mortgage deeds of the premises to C. The cheque for 7000*l.* was paid, but both the bills of exchange were dishonoured; C. afterwards conveyed all his estate to a trustee for the benefit of his creditors, and then became bankrupt. T. never reconveyed the premises:—*Held*, that as between T. and C., and his assignee by deed, and his assignees in bankruptcy, the receipt of the cheque and bills, and the giving the above memorandum, did not discharge the mortgaged premises from the mortgage, but that on their dishonor, T. was entitled to a decree against them all for the restoration of the title and mortgage deeds, and to a decree of foreclosure.[1] [2]

A party having an interest in the subject matter of a suit by virtue of a partnership, had parted with his interest prior to the date of filing the bill. The plaintiff nevertheless made him a defendant, and he by his answer disclaimed. The plaintiff was ordered to pay such defendant's costs, without being entitled to them over, the Court being of opinion that the plaintiff might have easily ascertained the fact of the assignment, and it not appearing that he had attempted to do so.

Although a defendant disclaim all interest in the suit at the bar, and his disclaimer is entered by the registrar, yet the Court will retain him on the record, if there be any question whether he has documents relating to the suit in his possession which ought to be delivered up; and an inquiry will be directed on the subject.

THE plaintiff having lent to the defendant Carruthers, £10,000; by indentures of lease and release, dated the 1st and 2nd of May, 1837, between the defendant Carruthers, of the one part, and the

[1] Where after the death of the obligor on a bond, his executors and devisee in trust under his will, by which he had charged his real estate with payment of his debts, gave a new bond on his own name for the same amount to the obligee who delivered up the original bond, and signed an endorsement thereon, stating that he had accepted the new bond "in lieu of it." The obligor in the new bond having afterwards become bankrupt, *Held*, in a creditor's suit for administration of the testator's estate, that the obligee had no right of proof upon the original bond. *Shore v. Shore*, 2 Phillips, 378.

[2] For cases of substituted securities and changes in, see *Hardwick v. Mynd*, 1 Anstr. 111. *Saunders v. Leslie*, 2 Ball. & B. 509. *Lee v. Lockhart*, 3 Mylne & Cr. 302.

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plaintiff of the other part, certain freehold and copyhold lands, forming an estate, called the Mitchell's Estate, and Waghorn Gate Farm, were, as to the freehold, released, conveyed, and assured unto the plaintiff, his heirs and assigns, and as to the copyhold, covenanted to be duly surrendered to him *and his heirs, subject to a proviso therein contained for [*32] the redemption and reconveyance thereof, on the payment of the £10,000, on the 2nd May, 1844, with interest, at £5 per cent. per annum, in the meantime, half-yearly, on the 2nd of November, and the 2nd of May. The indenture of release contained a proviso, that it should be lawful for the said defendant Carruthers, his heirs, executors, or administrators, to pay off the said sum of £10,000, or any part thereof, not being less than £1,000 at each payment, at any time before the said 2nd May, 1844, on giving six months' notice of each intended payment; but that it should not be lawful for the plaintiff, his heirs, executors, administrators, or assigns, to call in any part of the said principal before the said 2nd May, 1844, provided the said interest were punctually paid; but in case the same interest, or any half-yearly payment thereof, should be in arrear for the period of 30 days after the same should become due, then it should be lawful for the plaintiff, his heirs, executors, administrators, and assigns, to call in and require payment of the said principal sum and interest in like manner as if the time fixed for the payment thereof had expired.

In the month of December, 1839, the defendant, John Carruthers, gave to the plaintiff a cheque for £7000, on Messrs. Coutts & Co., in part discharge of the principal moneys due on the mortgage. He also gave to the plaintiff two bills of exchange, one for £1620, and the other for £1500, intended to be in discharge of the £3000, residue of the principal mortgage-money, and the interest then due on the security, which amounted to £120. Upon the receipt of the cheque and bills of exchange, the plaintiff gave a receipt for the mortgage-money and interest.

The cheque for £7000 was at first dishonored by Messrs. Coutts & Co., but it was shortly afterwards duly *paid. [*33] The bill for £1620 was discounted by Messrs. Coutts & Co. for the plaintiff, and it became due in their hands, and

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was dishonored. Upon this the defendant Carruthers paid Messrs. Coutts & Co. £120, part thereof in cash, and gave them a promissory note, drawn by him in favor of the plaintiff for the residue, which note was indorsed by the plaintiff as his surety. Carruthers at the same time deposited with Messrs. Coutts & Co. all the title deeds of the mortgaged property (except the mortgage deeds to the plaintiff, which he Carruthers retained), together with a memorandum in writing, by way of equitable mortgage, as a further security for the due payment of that note. The note, having become due, was dishonored, and the plaintiff paid the amount due thereon to Messrs. Coutts & Co. before the date of the filing the bill.

The bill of exchange for £1500 remained in the plaintiff's hands, and became due on the 26th of March, 1840, and was dishonored in the hands of Coutts & Co., and remained unpaid at the time of filing the bill.

The plaintiff, on the 8th of July, 1840, filed his original bill stating the above facts, and praying that Messrs. Coutts & Co. might be ordered to deliver up to the plaintiff the title-deeds of the mortgaged property and the memorandum of equitable mortgage; and that it might be declared that the plaintiff was entitled to a lien on the mortgaged property, not only for what he had paid Messrs. Coutts & Co. but also for the residue of the sum of £3000 and interest. And that the defendant John Carruthers might be ordered to redeliver to the plaintiff the mortgage deeds and the receipt, and that he might in the meantime be restrained by injunction from receiving the said title-deeds so deposited, or destroying or parting with the mortgage deeds or the

receipt or any title-deeds relating to the mortgaged property, and that Messrs. Coutts & Co. might in like manner be restrained from delivering up the title-deeds deposited with them to the defendant Carruthers or to any person other than the plaintiff, and for redemption, and in default of redemption for a foreclosure of the equity of redemption in the premises.

Subsequent to the date of the filing of the plaintiff's bill by indentures of lease and of release and appointment, dated the 7th and 8th of August, 1840, the defendant Carruthers conveyed

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the mortgaged premises to the defendant Hoggart and his heirs upon trust for sale, and to stand possessed of the proceeds upon trusts for benefit of the creditors of defendant Carruthers who should execute that deed. These deeds were executed by defendants Carruthers, Hoggart, and several creditors of Carruthers.

On the 21st of September, 1840, a fiat in bankruptcy was issued against Carruthers, upon which and prior to the 12th of October, 1840, he was declared bankrupt.

On the 12th of October, 1840, the defendant Carruthers answered the plaintiff's original bill, and by his answer stated, as the fact at the hearing appeared to be, that, in March, 1839, he took his son into partnership with him under the firm of "Carruthers & Co.," that the two bills of exchange of December, 1839, given by him to the plaintiff for £1620 and £1500, were respectively drawn by the firm of Carruthers & Co. of Manchester, upon and accepted by the defendant Carruthers in favor of the plaintiff, and that the sum of £120, part of the first bill (for £1620,) was for interest accrued due on the £10,000 (but not payable at that time.) The defendant's answer then proceeded to state that, in pursuance of the said arrangements, the plaintiff, upon such payment being made to him as last aforesaid, delivered up to the defendant the aforesaid mortgage deeds and the title-deeds, and at the same time gave to the defendant a memorandum or receipt in writing signed "by the plaintiff" [*35] as follows:—"£7000, London, 23rd December, 1839. Received this day of John Carruthers, Esq., the sum of £7000 in cash, and two bills of exchange as under for £3120, drawn by Messrs. Carruthers & Co of Manchester upon and accepted by the said John Carruthers, one dated 16th of December for £1620, the other dated 23rd December for £1500, and which cheque for £7000 and bills for £3120, making together £10,120, are in full of principal and interest due to me upon a mortgage of Mr. Carruther's freehold property in Kent and Sussex for £10,000, and I do hereby undertake when required to execute a conveyance of the said property. Thomas Teed." The defendant in his answer set out the indentures of conveyance and covenant to surrender to Hoggart, and the trust deed for the benefit of creditors,

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but he did not disclaim interest, and did not mention or allude to his bankruptcy, and he stated that the mortgage deed and receipt were then in the possession of his solicitor Mr. Paterson, subject to a lien by him thereon for costs.

Messrs. Coutts & Co. submitted by their answer to act as the Court should direct.

On the 12th of January, 1841, the plaintiff amended his bill; and on the 18th of the same month he filed a supplemental bill, whereby, after stating the bankruptcy of defendant Carruthers, and the effect of the indentures of the 7th and 8th of August, 1840, and the deed of declaration of trust of the latter date, and its execution by several creditors of defendant Carruthers, he prayed the relief asked by the original bill against the assignees in bankruptcy, the defendant Hoggart, and the creditors who executed the trust deed, and for a foreclosure against them respectively.

Neither the defendant Hoggart nor the defendants, the creditors, by their answers disclaimed interest, except a defendant named Stevens. He by his answer alleged that he had been in partnership with a creditor named Dunk, another [*36] *defendant; that such partnership was dissolved on the 24th of September, 1840, upon which he had assigned to Dunk a debt of £50 due to the partnership from the defendant Carruthers. He disclaimed all interest in the suit.

The defendant Dunk appeared to have executed the trust deed after the 24th of September, in the then late partnership name of Dunk & Stevens.

The assignees in the bankruptcy of Carruthers, by their answer, claimed all the rights and interests of the bankrupt in the premises.

Mr. *Russell* and Mr. *W. M. James*, for the plaintiff.—The objection of the assignees is understood to be this—that the plaintiff in December, 1840, gave up to the defendant Carruthers the title-deeds and the mortgage-deeds, and that he actually satisfied his mortgage by the cheque for £7000 and the two bills. The answer to this objection is obvious, that such satisfaction could only arise upon the actual payment of the two bills, and the satisfaction by payment of all that was due on the security.

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Mr. *Swanston* and Mr. *Rolt*, for the assignees.—The grounds on which the plaintiff comes before the Court are two. 1st. For a foreclosure on his own debt. 2ndly. As representing the rights of Messrs. Coutts & Co. in respect of the dishonored bill for £1620, and of their lien upon the deeds to secure that amount. It is admitted that he is correct in his second ground ; and the assignees do not dispute it.

But as to the first ground, it is submitted that he is wrong. Under the provisions of the mortgage deed the plaintiff was not entitled to foreclose till May, 1844, except in default of payment of the interest in the meantime. Now it does not appear that at the time when the arrangement between the plaintiff and Mr. Carruthers *was made, any interest was due. [*37] The plaintiff was then paid off by the cheque for the £7000 and by the two bills. A distinction is to be taken as to the cheque for £7000 and the two bills. The transaction would have been fraudulent if the cheque were not paid, but as to the two bills the plaintiff relied on the personal security of the parties to the bills to pay at a future time as a substituted security. The plaintiff on receipt of the cheque and bills gave up the title-deeds and mortgage, and gave the receipt and undertaking of the 23rd of December, 1839. Now what, for this accelerated payment and additional security of the firm of Carruthers & Co., did the plaintiff give up? he says nothing. He received not only the accelerated payment, but as to the two bills an additional security ; and we submit that as to the two bills it was a substituted security. Assent on both sides will convert a separate into a joint debt. The consideration was valuable, since the bills gave the plaintiff the additional security of the firm as well as the personal security of Mr. Carruthers. And though it was for many years a *verata quæstio*, the plaintiff may now prove on both estates till his whole debt is paid. This is settled in *Ex parte Sheppard*.(a) The consideration being valuable, the plaintiff, if called on so to do, the day after the payment of the cheque, would have been bound to reconvey the mortgaged premises. The plaintiff comes here not to enforce his mortgage, but to deny his contract. The conduct of the parties is consistent with this.

(a) 5 Jurist, 1147.

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On the 19th of March, 1840, the deposit of the title-deeds was made with Coutts & Co., and the memorandum of deposit with them signed. This was done by Mr. Carruthers ; and on that occasion the plaintiff never suggested that Carruthers had [*38] no right to deal with the estate as the owner ; in fact *Carruthers acted as the owner, and the plaintiff treated the estate as Mr. Carruthers', exempt from the plaintiff's lien.

If the plaintiff has no right to relief under his original mortgage, no benefit accrues to the plaintiff from his taking up the deeds from Coutts & Co. That is an accidental circumstance. No analogy in favor of the plaintiff can be drawn from the cases between vendor and purchaser as to lien for unpaid purchase money ; nor can the principle of tacking be applicable. The agreement was to reconvey immediately. The return of the deeds raises a presumption that the intention was to extinguish the claim on the estate : and if the plaintiff insists otherwise, the plaintiff should have averred in his bill that the deed was to remain as such security, which he has not done. Again, on the failure in payment of the bills, a party having a lien would have forthwith enforced or claimed it : but here, after the dishonor of one of the bills, Mr. Teed allows Mr. Carruthers to continue to act as having the whole legal title, and confirms the presumption that extinguishment had been intended. This comes therefore to a case of a reconveyance, or what is equivalent to it.

Mr. *Rogers*, for the defendants Carruthers and Hoggart, and for various creditors, parties to the indenture of the 8th of August, 1840, disclaimed at the bar all interest in the suit.

Mr. *Parker*, for the defendant Stevens, said that, having disclaimed by his answer, he had only to repeat his disclaimer at the bar, and he asked for his costs. For two other defendants he did not disclaim.

Mr. *Collins*, for another defendant.

[*39] *Nov. 12th.—THE VICE-CHANCELLOR.—In this case

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Messrs. Coutts & Co. having been satisfied by the plaintiff, the right of any third party does not intervene. Mr. Carruthers' other co-defendants do not and could not claim any higher or better right than he, if solvent, could have done. The question in the cause therefore stands in the same way as if it were between Mr. Teed and Mr. Carruthers personally.

If I were satisfied that the agreement between them was understood and intended by them to be, that the mortgaged estate should be absolutely discharged, whether the bills were honored or dishonored, productive or waste paper—however unusual or improvident I might consider such an agreement, I might very possibly have thought it right to give effect to such a contract, clearly proved.

It is contended that the receipt of the 23rd of December, 1839, coupled with the delivery of the cheque afterwards paid, the delivery of the bills, and the delivery to Mr. Carruthers of the mortgage and title-deeds, amounts to clear proof of such an agreement. I am not, however, satisfied that this as between themselves was intended by them; the form of the receipt and the facts to which I have referred being in my judgment neither conclusive on the point, nor of themselves sufficient (and they are, substantially, all that there is) to establish so improbable a state of things.

I have not forgotten the accelerated payment of the principle, partly fulfilled and partly promised, and that the interest seems not to have been substantially in arrear in December, 1839; but the acceleration may be gathered to have been more an object to Mr. Carruthers than to the plaintiff, who does not seem to have been desirous to call in his money: nor is the liability of Carruthers & Co. on the bills an ingredient of any weight, where the other facts are such only as they are here. I think *the [*40] case also capable, if necessary, of being viewed in a manner analogous to that in which questions of lien between vendors and purchasers of real estate are considered. Generally where a vendor receiving bills for the purchase-money signs a receipt for the amount as cash, and actually conveys the estate as upon payment, he retains as between him and the purchaser, a lien on the estate for the money in the event of the bills being dis-

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honored, unless the purchaser can show an agreement to the contrary. I need do no more than refer to the well-known cases of *Hughes v. Kearney*,^(a) *Grant v. Mills*,^(b) *Winter v. Lord Ansen*,^(c) and a prior case in bankruptcy of *Ex-parte Loaring*.^(d) In one at least of these, which are only a few of the numerous cases on that subject, there was an added liability on the bills.[3] Why should a mortgagee reconveying to the mortgagor, on receiving payment in the shape of bills, be in a worse situation than a vendor having or not having a binding contract prior to the conveyance? In the present case a reconveyance has not taken place; but probably if it had (though it is not necessary to decide this point,) it would, in my judgment, have made no difference. The disclaiming defendants must be dismissed; but as to the others, there must be the ordinary decree of foreclosure. As to the costs of the disclaiming defendants; whose disclaimers at the bar must be noticed in the decree, I wish to hear the plaintiff's counsel.

Mr. Russell was then heard upon the question of costs.

(a) 1 Sch. & Lef. 132.

(b) 2 Ves. & B. 309.

(c) 3 Russ. 488. [S. C. 1 Sim & Stu. 434.]

(d) 2 Rose, 79.

[3] "It is a well settled rule that the vendor has a lien on the estate for the purchase money, while the estate is in the hands of the vendee, and when there is no contract that the lien by implication was not intended to be reserved. *Prima facie* the purchase money is a lien upon the land, and it lies on the purchaser to show, that the vendor agreed to rest on other security. The death of the vendee does not alter the claim. Taking a note for the purchase money does not affect the vendor's lien, and if part be paid, the lien is good as to the residue, and the vendee becomes a trustee as to that which is unpaid." Kent Ch. *Garson v. Green*, 1 Johns. Ch. Rep. 308. By joining a third person as security the lien is lost. *Fish v. Howland*, 1 Paige 20, in which case Walworth Ch. considers the safer rule to be, "to sustain the implied lien whenever the vendor has taken the mere personal security of the vendee only, and to consider any bond, note or covenant, given by the vendee alone, as intended only to countervail the receipt of the purchase money contained in the deed, or to show the time and manner in which the payment is to be made, unless there is an express agreement between the parties to waive the equitable lien; and on the other hand, to consider the lien as waived, whenever any security is taken on the land or otherwise, for the whole or any part of the purchase money, unless there is an express agreement, that the equitable lien on the land shall be retained." See *Parrott v. Sweetland*, 3 Myl. & K. 655, where a distinction is taken between a security, and a substitution for the price.

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THE VICE-CHANCELLOR.—The defendant Stevens had assigned the debt to his partner before the trust-deed, and *had nothing to do with the trust-deed; it appears to me, [*41] that that state of things might have been learnt by the plaintiff if he had desired to inform himself of it, and that he should have endeavored to inform himself of it, before the bill was filed.

I think, therefore, that Stevens, disclaiming at the bar by his counsel, as well as on the record, is entitled to be dismissed on that disclaimer, with his costs of the suit, and the plaintiff ought not to have them over. With regard to Mr. Carruthers, and certain creditors, represented by Mr. *Rogers* and Mr. *Collins*, neither of these parties does disclaim on the record, neither of them intimates that he has not an interest; on the contrary, as far as they are concerned, the aspect of the record shows that they have an interest; consequently, though I must dismiss the defendants, the creditors, as they disclaim at the bar, I cannot give them their costs, because they had an interest, and they appear here asserting that interest up to the moment of the hearing.

With regard to Mr. Carruthers, I have had some doubt. It appears, however, that by his answer after his bankruptcy, he does not object to being a party or being continued as a party on the ground of the bankruptcy. He does not even, in his answer, mention his bankruptcy, but takes up the case as a solvent person would do, not disclaiming, but claiming, by his answer, in effect and substance. On this special ground, therefore, I think, that though, on his disclaiming at the bar, he should now also be dismissed, yet I cannot give him costs.[4]

Mr. *Russell* then observed that it appeared from the answers

[4] Where a defendant disclaims all interest, and then proceeds to answer the bill in detail, he can in no case have more costs than arise upon a disclaimer, or what was necessary to show that he had parted with the interest once held by him. *Hutchinson v. Reed*, Hoff. Ch. Rep. 317. Where a bill was filed in consequence of a claim made by a defendant to a fund, the defendant, in his answer disclaimed all right to the fund, but stated certain facts as the ground for his not being ordered to pay the costs of the suit. The plaintiffs entered into evidence, by which they falsified those statements, the court held they were justified in so doing, and ordered defendant to pay costs of suit. *Deacon v. Deacon*, 7 Sim. 378.

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of the defendants Carruthers and Hoggart that the mortgage-deed was in the possession of Mr. Paterson, as the agent either of Hoggart or Carruthers, subject to a lien of Mr. Paterson thereon.

[*42] *THE VICE-CHANCELLOR said that under these circumstances, the plaintiff not consenting to dismiss Mr. Carruthers, the court, notwithstanding his disclaimer at the bar and the entry of it by the registrar, could not dismiss him. An inquiry must be directed as to the possession of the mortgage deed, and Mr. Carruthers must remain a party to the record as to that inquiry.

THE disclaimer of Carruthers, Skipsey, and Larking, (creditors,) and Stevens to be entered. Let the bill stand dismissed, without costs, as against Skipsey and Larking. Let it be dismissed as against Stevens, with costs, to be paid by the plaintiff: the plaintiff not to have these costs over against the estate of Carruthers. Let Messrs. Coutts' costs be taxed and paid by the plaintiff, and be added to his security. Let Messrs. Coutts and Company hand over to the plaintiff the deeds in their possession. Let the Master inquire in whose custody and in whose power and under what circumstances the mortgage deeds are. Reserve the costs of that inquiry, with liberty to apply. In other respects the usual decree of foreclosure.

JONES v. SMITH.

1842: Dec. 3rd and 8th.

A commission to examine witnesses and the depositions taken thereunder were intituled in an original and revived suit, but the interrogatories were intituled as in a single suit, though in a manner applicable either to the original suit, or to the suit as revived:—*Held*, that the interrogatories were not wrongly intituled, and a motion to suppress them was refused.

IN 1824 the plaintiff filed his original bill against Thomas Assheton Smith and William Turner, praying for an account of an alleged partnership between the parties. The suit remained dormant for some years, and Smith died without having filed his answer. Afterwards, in 1840, the plaintiff filed his bill of revivor against Thomas Assheton Smith, the son and personal representative of the original defendant. Tho-

[*43] mas Assheton Smith the son answered *the original bill and bill of revivor, and in July, 1842, a commission for

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the examination of witnesses issued in which the plaintiff and defendants joined.

On the 7th November last a motion was made in these causes on behalf of the defendant Turner, that the depositions of a person of the name of Millington, who had been examined on the part of the plaintiff, might be suppressed on the ground (which was supported by affidavits) that the witness, after having been for some time examined by the commissioners, was allowed to go to the plaintiff's attorney in an adjacent room, where he and the attorney examined certain documents, and then returned together to the commissioners, who pursued their examination of the witness. In support of that motion, *Shaw v. Lindsey*,^(a) and *Hosier v. Hart*,^(b) were cited, and on the other hand Dan. Pr. Vol. 2, p. 498, was referred to. The motion, however was ultimately compromised, the *Vice-Chancellor* having intimated an intention to allow Millington to file an affidavit.

A motion was now made that the depositions of all the witnesses examined on the part of the plaintiff in these causes might be suppressed, on the ground of irregularity in the title to the interrogatories, they being headed in a cause wherein "Hugh Jones is complainant and Thomas Assheton Smith and William Turner are defendants:" whereas, under the commission the commissioners were directed to examine all witnesses upon interrogatories, to be exhibited in "a cause wherein Hugh Jones is complainant and Thomas Assheton Smith (since deceased) and William Turner are defendants, by original bill; and wherein the said Hugh Jones is complainant and Thomas Assheton Smith the younger is defendant, by bill of revivor;" the depositions taken by the commissioners under such commission being also intituled in the manner last mentioned.

*The present motion was supported by the affidavits of [*44] Mr. Wood and Mr. Roberts, who were respectively the town agent and country solicitor of the defendant, who stated that at the time when the former order was made they were not aware of the manner in which the interrogatories were headed.

Mr. Russell and Mr. Renshaw, for the motion, cited *Pritchard v. Foulkes*.^(c)

(a) 15 Ves. 380.

(b) Mos. 321.

(c) 2 Beav. 153.

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Mr. *Wigram* and Mr. *Heberden*, *contra*.

Dec. 8th.—THE VICE-CHANCELLOR.—The question upon this motion is, whether the depositions taken on the part of the plaintiff should be suppressed for irregularity; the ground taken being, that the interrogatories on which the witnesses were examined differ in title from the commission under which the interrogatories were administered, and from the depositions themselves, and are incorrectly intituled.

The motion is made on the part of the defendant Turner on whose part a former motion had been previously made and disposed of, which had for its object the suppression, for irregularity of the depositions of one alone of the plaintiff's witnesses.

The ground alleged in argument and by affidavit in support of that former motion (notice of which was not served until some days after publication had passed) was some irregularity or supposed irregularity, in conducting the examination of that witness or in the course pursued while the examination was proceeding.

An order upon that application was, during the term, made by consent, to the effect that the depositions impeached by it should stand, and that the cause should be appointed for hearing on the first day of causes after the term.

[*45] *The 3rd instant having been a day for causes as well as motions, the cause accordingly stood in the paper for hearing after the motions on that day. But before the court arrived at it, the motion of which I am now to dispose, notice of which was given subsequently to the term, was made.

Its ground, if tenable, was effectually available in support of the former motion, but was not then suggested. The party moving, or his solicitor, though they may not then have thought of it, and may not, when notice of that application was given, have received an office copy of the plaintiff's depositions and interrogatories, yet had received that office copy before the day on which the consent order just mentioned was made.

[His Honor then referred to the circumstances stated in the affidavits of Mr. Wood and Mr. Roberts, and proceeded thus:—]

The circumstances that I have mentioned may be deemed material upon the motion now before me. Supposing, however,

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that they were out of the case, ought I to accede to what this defendant asks? The proposition, which, in order to succeed, he must establish, is, that on indictment for perjury could not be sustained upon the depositions of the plaintiff's witnesses, or that they are vitiated by some material irregularity affecting the whole of them. He has not established his proposition to my satisfaction.

When the case of *Pritchard v. Foulkes* was first cited to me, I understood that the depositions there sought to be suppressed were depositions taken on the part of the plaintiff; and had it been so I should have considered that case clear of all difficulty. I allude to the application in *Pritchard v. Foulkes* first reported in 2 Beavan, not to that mentioned at the foot of page 136 in that volume. As that case was afterwards explained to me, and as it appears in the book, it had some difficulty. It is not necessary or material that I should on the present *occa- [*46] sion express or intimate any opinion or doubt that I may entertain, if indeed I have formed any opinion or doubt, as to any branch of it. I apprehend that *Pritchard v. Foulkes* and my present decision may well stand together.

The present case is thus:—Jones was and is the sole plaintiff. The original defendants were Thomas Assheton Smith and the party who moves. Thomas Assheton Smith having died before any witness had been examined and before any commission had issued and, indeed, before either defendant had answered, the plaintiff filed a bill of revivor (a mere bill of revivor in the ordinary form, and regular and sufficient, as I collect) against the present defendant Thomas Assheton Smith, the son and personal representative of the deceased defendant, as his personal representative. Upon this bill, after the present Mr. T. A. Smith had put in one answer to both bills admitting assets, the usual order of revivor appears to have been regularly made. The abatement or partial abatement was thus cured, and the cause again regularly and sufficiently constituted in point of parties.

This having been done, the commission in question regularly issued. It was intituled thus: "Victoria &c.," "We give you full power and authority diligently to examine all witnesses,"

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&c. [see *ante*, p. 43.] The depositions agree substantially in title with the commission, except one inaccuracy, perhaps immaterial. The objection suggested is, that the title of the plaintiff's interrogatories, differing from the title of the commission, was thus: [see *ante*, p. 43.] Is there any substantial difference? Is there any substantial inaccuracy in this title? It may first be observed that the defendant Turner, before he put in his answer, was aware of the abatement, and when, or before the commission issued, was aware of the revivor, and that the addition "the younger" to the name of the present Mr. Thomas Assheton Smith could after his father's death be proper only when [*47] his name was mentioned together with that of *the father, or when there was an occasion for distinguishing one from the other.

It seems to me that, admitting the title of the commission to be correct, the title of the interrogatories is not incorrect in describing them as being in a single cause; that cause being constituted of Jones as plaintiff against Thomas Assheton Smith and Turner as the defendants. I apprehend that there are not two causes, and that the suit is the one original cause which, after an abatement or a partial abatement, has been, and stands revived; the plaintiff having remained throughout unchanged, the present Mr. Smith being by a proceeding merely of revivor substituted for his deceased father whom he represents, and there having been no other alteration or addition. If Lord *Redesdale's* book be referred to, I apprehend that his mode of treating the subject will be found exactly to correspond with the view which I have endeavored to express of it. (a) *Catton v. Lord Carlisle*, (b) *Pruen v. Lunn*. (c) It is true that there are two bills. But if the cause is single, why should it be held necessary to mention the plurality of bills in the title of the interrogatories? That title seems to me substantially to agree with the state of the cause, and not substantially to differ from the title used in the commission. We are not now dealing with the case of an abatement by the death of a plaintiff or the marriage of a female

(a) Mitf. Pl. (3rd edit.) pp. 44, 45, 48, 53, 59, 60.

(b) 5 Madd. 427.

(c) 5 Russ. 3. The *Vice-Chancellor* also stated the ordinary and regular form of an order of revivor.

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plaintiff; especially not with a case where upon the death of a plaintiff his interests in the subject of suit sever and vest in different persons: nor are we dealing with a case of revivor after decree. We are dealing with a most simple and common case of revivor on the death of a defendant before the hearing—before any examination of witnesses—before any commission—and before answer; to different considerations *from [*48] which the other cases to which I have just alluded may or may not be open.

On the whole I think it right to refuse this application. But in doing so my mind is not free from doubt. Without saying, however, that it is better to err in favor of substance against form, than to be right in favor of form against substance, I may say that to err in favor of substance against form, is better than to err in favor of form against substance.[1]

I think at present that the costs of both parties should be costs in the cause, but if the plaintiff's counsel wish to address the Court on the subject of costs, they of course have the right of doing so.[2]

[1] The following case, although somewhat earlier in date, decided by the Master of the Rolls in June 1841, could not, in all probability, have been in print at the period of the decision in the text, and was therefore overlooked both by the court and the counsel. A supplemental bill was filed in which a deceased person was named as co-plaintiff, and as next friend of infant plaintiffs, and in the title of the plaintiff's interrogatories for the examination of witnesses, his name was mentioned as being still a party; it was held that a defendant who had acquiesced and intituled his interrogatories in a similar manner, could not, after publication, move to suppress the depositions; and the Master of the Rolls, (Lord Langdale) observed "that in making his decision in *Pritchard v. Foulkes*, (2 Beav 133,) there was a considerable difference of opinion among the officers of the court as to the correct mode of intituling these matters; and that in the case of *Pritchard v. Foulkes*, he had himself been under the necessity of deciding between conflicting opinions as to the practice." *Lincoln v Wright*, 4 Beav. 166.

[2] When costs of a motion are costs in the cause, see further *Richardson v The Bank of England*, 1 Beav. 153.

1842.—*Storer v. Great Western Railway Co.*

STORER V. GREAT WESTERN RAILWAY COMPANY.

1842: Nov. 12th.

This Court has jurisdiction to enforce the specific performance of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages.

THE plaintiff was the owner of a mansion-house and pleasure grounds, and lands adjoining.

The defendants had obtained power, under certain acts of Parliament, to construct a railway from London to Bristol, but desiring to deviate from the line to which, by those acts, they were restricted, gave notice of an intended application to Parliament for another act to authorize such deviation, and to carry their railway across certain specified lands, amongst which were the plaintiff's pleasure grounds and lands.

The plaintiff gave the Company notice of his intention to oppose their application. A treaty was afterwards entered into between the parties, and on the faith of the agreement, which was the result of that treaty, he withdrew his opposition. The bill was passed accordingly, the defendants constructed their railway across the plaintiff's pleasure grounds and lands, and the public had ever since used it.

[*49] *The agreement was under seal, dated the 24th of April, 1837, and made between the defendants, Messrs. Gibbs, Gower, & Fenwick, thereof, the directors of the Company, on behalf of the Company, of the one part, and the plaintiff of the other part. By this agreement the plaintiff agreed to withdraw his opposition to the defendants's bill, and the defendants agreed to purchase so much land as was necessary for their purposes, at a price named, and to construct and for ever thereafter maintain one neat archway, sufficient to permit a loaded carriage of hay to pass under the archway, at such place as the plaintiff, his heirs and assigns, should think most convenient in his pleasure grounds, and should form and complete the approaches to such archway.

The agreement not having been performed with respect to the

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construction of the archway and its approaches, the present bill was filed to enforce the specific performance of the agreement in that particular.

Mr. *Wigram* and Mr. *Bazalgette*, for the plaintiff.—The Court has jurisdiction to decree the specific performance of an agreement to build; and though in the case of erecting a house there may possibly be some difficulty on this head, there can be no such difficulty where relief in specie is the only substantial relief, and the only relief prayed: *Allen v. Harding*,^(a) *Holt v. Holt*.^(b) In *City of London v. Nash*^(c) the Court entertained the jurisdiction; but, under the circumstances of that case, gave relief by way of inquiry of damages before a jury. Specific performance of a contract to build a house was decreed in *Pembroke v. Thorpe*.^(d) In another case, *Moseley v. Virgin*,^(e) the bill was dismissed; but the Court there said, [*50] “If the transaction and agreement (to build) is in its nature defined, perhaps there would not be much difficulty to decree specific performance.” In *Franklyn v. Tuton*,^(f) relief was given upon the same principle.

The rule to be derived from all the cases is this—that where, from the nature of the relief asked, performance in specie will alone answer the justice of the case, there it is granted. It may be conceded that the authorities also show that the Court will not give such relief where performance in specie is not necessary: *Errington v. Aynesly*,^(g) *Flint v. Brandon*.^(h) Here, however, such necessity exists. The Company is seised in fee of the soil on which the archway is contracted to be built, and the plaintiff cannot go upon their soil. It was only upon a consideration of these principles that relief was not given in *Lucas v. Comerford*.⁽ⁱ⁾ In *Lane v. Newdigate*,^(j) an order specifically to repair was refused, but the object was effected by a negative injunction. *Rankin v. Huskisson*,^(k) *Whittaker v. Howe*.^(l)

If the Court should decree specific performance it will also

(a) 2 Eq. Cas. Abr. 17.

(b) 2 Vern. 322; S. C. 1 Ch. Ca. 190.

(c) 3 Atk. 512.

(d) 3 Swan. 437, n.

(e) 3 Ves. 184.

(f) 5 Mad. 469.

(g) 2 Bro. C. C. 342.

(h) 8 Ves. 162.

(i) 3 Bro. C. C. 166; 1 Ves. Jun. 235, and 8 Sim. 499.

(j) 10 Ves. 192.

(k) 4 Sim. 13.

(l) 3 Bea. 383.

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grant an injunction against using the railway in the meantime ; so as effectually to secure to the plaintiff the relief prayed. It is not material that the injunction has not been prayed for. The plaintiff's case is shortly this : that he cannot go upon the defendants' soil to construct the archway, and no amount of damages will compensate him.

Mr. *Cooper*, Mr. *Stevens*, and Mr. *Osborne*, for the [*51] *Company.—As to the alleged jurisdiction to decree the specific performance of a contract of this nature, it is submitted that, where the building has not been commenced and does not exist, the Court will not interfere, but leave the party to a more fitting remedy at law. In the case of a contract to build a square, if one house were in course of building the Court might interfere. So, if the Company were in this case building the archway in a way differing from the agreement of 1837. The exercise of this ancient jurisdiction may be traced from the Year Books. In Lord *Hardwicke's* time, the remedy by action on the case became more common, and as that action could be applied to these contracts, there was less occasion for the interference of this Court. In this case we submit that the plaintiff's whole remedy is at law.

The case of *Allen v. Harding* does not assist the plaintiff's argument ; the ground of decision there being that the contract was for the benefit of the church. The most material case for the plaintiff is that of *Pembroke v. Thorpe*, which was in the nature of a case for a partition. That, however, was special in its circumstances. Besides, Lord *Hardwicke* in reconsidering the question, seven years afterwards, in *The City of London v. Nash*, changed his opinion. In *Franklyn v. Tuton* the decree was unopposed. [The *Vice-Chancellor*.—That is important.] It was the case of a building erected at variance with a plan, and comes within the distinction for which we contend. *Moseley v. Virgin* was a case of waste. In later times the Court has refused to interfere. In *Errington v. Aynesly* the Court declined to order specific performance, because money was an adequate compensation. In *Lucas v. Comerford*, Lord *Thurlow* having had occasion to consider the doctrine, said there could not be a

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decree to rebuild, as he could no more undertake the conduct of a rebuilding than of *repairs. No dictum of Lord [*52] *Eldon* to the contrary can be found.

The Court has always repudiated a jurisdiction to enforce a covenant to repair. If there were jurisdiction to decree the making an archway, or building a house, why not also to decree the digging a well or papering a room? If any such jurisdiction exist the absence of modern decrees is remarkable. In *Flint v. Brandon* the decree of specific performance was refused. There are other authorities—*Booth v. Pollard*,^(a) where several cases were cited; and the cases collected in a note to 3 Swan. 437. Lord *Henley*^(b) and Mr. Justice *Story*^(c) also collect the authorities, and the conclusion appears to be that the Court has no such jurisdiction. The performance of this agreement is so difficult as almost to be impossible.

THE VICE-CHANCELLOR.—If the thing be reasonably possible it must be done. The difficulty and expense of performing the contract do not necessarily form an objection. In a case, I think, of the *Brighton Railway*, before Lord *Cottenham*, it was shown that the expense of making a road would be very great and burthensome; but his Lordship did not accede to that reasoning. I have no doubt that this work ought to be done; the only question is, whether it can be enforced on these pleadings, but I am clear that under some shape of the pleadings it can be enforced.

Mr. *Cooper* then stated that the directors, being trustees, could not consent to a decree; but, as the *Vice-Chancellor* had intimated his opinion, the defendants would submit to such a decree as the Court might make.

*THE VICE-CHANCELLOR.—The course of the argu- [*53] ment and the intimation of the defendants' counsel render it unnecessary for me to give that further consideration to the authorities and points in difference which, if the case were still adversely contested, I should have done. Consistently with the principle of the case of *Flint v. Brandon*, with which I agree,

(a) 4 Y. & C. 61.
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(b) *Eden on Injun.* 26.
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(c) 2 Eq. Jur. p. 23.

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it is competent to this Court to interfere to enforce the specific performance of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages. The defendants having purchased land intersecting the plaintiff's land, contracted to make a communication for carriages, through the land thus acquired by them, for the plaintiff, from one side to the other. The defendants have acquired property under that contract, and its performance is now resisted; for what reason it does not on the pleadings plainly appear. Damages would not be an adequate compensation. In my opinion, the plaintiff has a right to specific performance, and it is competent to this Court to say that the work shall be properly done. The Company seem to think that the Court might deal more leniently with them than a jury; in that they are probably right, for this would possibly be a case for very heavy damages. There is no difficulty in enforcing such a decree. The Court has to order the thing to be done, and then it is a question capable of solution whether the order has been obeyed. The Company is bound to perform the agreement; but, on the other hand, the plaintiff must give the Company every facility for making the approaches, and must put them, as I understand he undertakes to do, into possession of the land necessary for such approaches. Though this is not a judgment after all the deliberation which, under other circumstances, I should have bestowed on the case; yet my present opinion is clearly as I have stated.[1]

DECLARE that the defendants, the Company, are bound to construct and for ever hereafter to maintain one neat archway sufficient to permit a loaded carriage of hay to pass under the railway, at such place as the plaintiff shall think most convenient in his pleasure grounds, and to form and complete the approaches to such archway. Let the plaintiff point out such place within a reasonable time, with liberty to the defendants to apply to this Court in case of refusal by the plaintiff to afford them all reasonable assistance in his power for such work or otherwise, and with liberty to the plaintiff to apply in case of delay by the defendants or otherwise. The Company to pay all costs of this suit, including the costs of the other defendants. Let the other defendants, on consent of the plaintiff and the defendants, the Company, be now dismissed.

[1] So, it was held by Walworth, Ch. citing the case in the text, that the Court of Chancery has jurisdiction to compel the specific performance by the defendant, of a

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SALISBURY V. HATCHER.

1842 : Dec. 6th.

Specific performance of a contract for sale of an estate in fee simple decreed in favor of a vendor who at the time of the contract was tenant for life only ; the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor, and the vendor being able by means of the consent of the parties interested in remainder to make a good *prima facie* title to the fee simple at the hearing.

FRANCIS WEBB, by his will and codicil, devised his real property, including certain freehold lands in the parish of Marnhull, which were the subject of this suit, to James Edward Earl of Malmesbury and Thomas Alfred Harris, their heirs and assigns, upon trust, with all convenient speed after his decease, and with the approbation of Frances Salisbury, widow, the testator's only child, and the plaintiff in this cause, to sell so much as should be necessary for the purpose of paying the remainder of the purchase monies for certain estates which he had agreed to purchase, and of supplying any deficiency in his personal estate to discharge his debts, and for the purpose also of raising £10,000 for the plaintiff, and subject thereto upon trust to stand seised of the same estates, or so much thereof as should not be *wanted for those purposes, upon trust for the [*55] plaintiff and her assigns for her separate use for her life, without power of anticipation, and after her decease, upon trust for all and every, or such one or more of the children, exclusive of the other or others, of the plaintiff, for such estate and estates, and in such shares and proportions, manner and form, as the plaintiff by any deed or instrument in writing to be executed in manner therein mentioned, or by her last will and testament, should appoint, and in default of such appointment, upon certain trusts for her three children and their issue, in equal proportions, and for default of such issue upon such trusts as therein mentioned. And he appointed his said daughter sole executrix of his will.

covenant to make erections or improvements upon his own land, for the benefit of the plaintiff, as the owner of the adjoining property, and who has an interest in having such erections or improvements made ; and where the injury to the plaintiff from the breach of the covenant is of such a nature as not to be capable of being adequately compensated in damages. *Stuyvesant v. The Mayor, &c. of New York*, 11 Paige, 15.

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The testator died in October, 1814. The plaintiff, who was a widow, had three children only living at the testator's death; viz. Ann Caroline, Maria, and Sophia Frances.

In August, 1829, a marriage being in contemplation between Ann Caroline Salisbury and Edwin Burnaby, an indenture dated the 24th of that month was duly executed by the plaintiff, whereby, in pursuance of the power given to her by her father's will, she appointed, that, subject and without prejudice to the payment and performance of the debts and engagements of her father then remaining unsatisfied or unperformed, and also subject to the sums of money raised and charged by his trustees or executrix for the purpose of carrying into execution the contracts entered into by him, and also subject to and without prejudice to the powers of sale and mortgage vested in them by his will and codicil, the manors and hereditaments devised by or subject to the trusts of such will and codicil, and which should remain unsold after payment of his debts, and the sums charged thereon by his trustees and executrix should, immediately after her the plaintiff's decease go in equal third parts amongst her three children in fee. She retained, however, a power of revocation as to the two
[*56] third parts appointed to her daughters Maria and Sophia Frances.

By an indenture executed two days after the last-mentioned indenture, being the marriage settlement of Ann Caroline Salisbury and Edwin Burnaby, Ann Caroline Salisbury released and confirmed the one undivided third part in the devised estates to which she was entitled under the deed of appointment executed by her mother, the plaintiff, subject to the trusts of her grandfather's will and codicil, and without prejudice to the plaintiff's life estate, unto James Edward Earl of Malmesbury and Steward Beaumont Burnaby and their heirs, upon trust, as soon as conveniently might be after the decease of the plaintiff, or in her lifetime, with her concurrence, and at the request of Mr. and Mrs. Burnaby, during their joint lives, or of the survivor of them, to sell and dispose of the same to any person or persons whomsoever, and apply the produce of the sale upon the trusts therein mentioned. The deed contained the usual clauses that the receipts of the trustees should be sufficient discharges for the purchase-money, and that

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the purchaser should not be obliged to see to the proper application of such money.

In August 1839, the plaintiff, who since the death of her father had been in possession of the devised estates, and had taken an active part in the execution of the trusts of his will finding it necessary to sell part of the testator's real estates for payment of the testator's debts, agreed with the defendant, Edmund Hatcher, for the absolute sale to him of the fee simple and inheritance of the Marnhull estate at the price of £31,500. This agreement was put into writing and signed by the parties, and bore date the 19th August, 1839. Amongst other stipulations, it contained the following: that the plaintiff or her heirs should cause to be made and delivered at her and their own expense unto the defendant or his solicitor, within two *calendar months, a full [*57] and satisfactory abstract of the title of the plaintiff to the premises, &c. That if the defendant should raise any objection to the title, not therein provided for, the abstract should be returned within two calendar months from the time of the delivery thereof, with the objections thereto in writing; and in case the abstract should not be returned within that period, it should be deemed a waiver of all objections, and an acceptance of the title. And the plaintiff agreed, that she would, on or before the 6th of April, 1840, on receiving from the defendant the said sum of £31,500 execute proper conveyances and assurances of the inheritance in fee simple in possession of all and singular the premises unto and to the use of the defendant, his heirs and assigns, or as he or they should direct, free from incumbrances, except the land tax; and also that all necessary parties should, if required, join in the said assurances, according to their respective estates and interests. And it was agreed, that such conveyances and assurances should contain all usual and other proper covenants for the title, for quiet enjoyment, freedom from incumbrances except land tax, and further assurance, and should be prepared by and at the expense of the defendant, and be perused, approved, and executed by all the necessary parties, or their solicitors, at the expense of the plaintiff. And the defendant promised and agreed, that, upon the execution of such conveyances and assurances, he would pay unto the plain-

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tiff the said purchase money of £31,500, and also the amount at which the timber should be valued.

On the 23rd of August, 1839, the plaintiff's solicitors sent to Mr. Hodgkin the conveyancer, at the desire of the defendant, a copy of the agreement and an abstract purporting to be an abstract of the title of the trustees and devisees of the late Francis Webb, Esquire, and their mortgagees, to divers messuages, farms, lands, and hereditaments in the parish of Marnhull in [*58] the county of Dorset. On the 11th November the defendant's solicitors returned the abstract to the plaintiff's solicitors, with the observations and requisitions of Mr. Hodgkin.

Neither the deed of appointment of the 24th August, 1829, nor Mrs. Burnaby's settlement, were comprised in the abstract; but Mr. Hodgkin having suggested that it would be desirable that an appointment should be made of the fee to the daughters, and that they should join in the conveyance with the surviving trustee and the plaintiff, the plaintiff's solicitors, in directing their attention to that point, ascertained that an appointment had been already made as before stated. They accordingly wrote to the defendant's solicitors to that effect; and on the 1st February, 1840, sent them a copy of the deed of appointment. They also, some weeks afterwards, in compliance with the request of the defendant's solicitors, sent them an abstract of Mrs. Burnaby's marriage settlement; referring them to the office in London where the abstract could be compared with the original.

A correspondence of some length respecting the title then took place between the plaintiff's and defendant's solicitors, and on the 23rd of April, 1840, the solicitors of the latter sent some further requisitions to the solicitors of the former, who, on the 13th of May and 14th of June following, sent answers to such requisitions. A further correspondence ensued, and on the 31st of July, 1840, the defendant's solicitors, in reply to two letters of the plaintiff's solicitors, wrote that they intended to submit the papers again to counsel, after which they should hear from them again. On the 6th October they accordingly wrote as follows:—"Gentlemen—We feel very considerable difficulty in replying to your two several letters upon this subject, for we have not yet sent back the papers to our counsel for his final opinion upon the title as shown

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by you. We confess, the mode in which your clients have *disclosed their title, even to yourselves, has created [*59] a strong impression in our minds that there may be still some charges or incumbrances affecting the estate, of which we have no notice, and against which our utmost vigilance may be unable to guard the purchaser; for it must be within your recollection, that no disclosure of the daughter's settlement, and several mortgages affecting the estate, was made by you for many months after you had delivered what you were led to believe was a full and complete abstract of the vendor's title; and we have now no guarantee that there are not others of a similar nature: besides that, we have but a flimsy protection from those that our inquiries have opened. We have seen sufficient in the deduction of this title to satisfy us, that we shall be incurring a great responsibility in advising our client to take it &c. Under these circumstances, our client has made up his mind not to complete the purchase, and you will therefore consider this contract as abandoned by him; and we trust you will feel it the interest of your client, under all the circumstances to yield to his determination."

To this letter the plaintiff's solicitors replied, in a letter of the 3rd December, 1840, containing the following passage:—"We believe that all the requisitions made by you have been satisfactorily answered; but to avoid any doubt as to the willingness of the parties entitled under Mrs. Salisbury's appointment to concur, according to Mr. Hodgkin's suggestion, we have obtained their consent in writing, of which we inclose copies. We are willing to consider any point in which you may think the evidence which has been furnished incomplete. But if Mr. Hatcher adheres to his resolution not to complete the contract, there will be no alternative but a suit, which, if necessary, we have positive instructions at once to institute." In this letter were inclosed the consents in writing of Steward *Beaumont Burnaby, Edwin [*60] Burnaby, and Ann Caroline Burnaby, Sophia Frances Salisbury, and Maria Salisbury. Neither the defendant nor his solicitors ever made any reply to this letter; and consequently on the 23rd of January 1841, the plaintiff filed her bill for specific performance of the agreement.

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In September, 1841, James Edward Earl of Malmesbury, who had survived his co-trustee, Mr. Harris, died intestate as to the trust estates, leaving James Howard, Earl of Malmesbury, his eldest son and heir-at-law.

The cause came on for hearing on the 16th November last, when, on the plaintiff undertaking to pay the costs of the day, it was ordered to stand over, in order to give her an opportunity of bringing before the Court the Earl of Malmesbury, Mr. and Mrs. Burnaby, S. Beaumont Burnaby, Maria Salisbury, and Sophia Frances Salisbury. The plaintiff accordingly, on the 24th November, filed her supplemental bill and bill of revivor against the last-named five parties, stating these facts, which were in evidence; viz. that on the 25th August, 1840, the plaintiff caused the contract to be communicated to John Edward Earl of Malmesbury, and requested his approval thereof; that a copy of the contract was at his request forwarded to him, and that he considered the same and approved thereof, and returned the same to the plaintiff's solicitors, with his written approval thereof, &c. That the contract was in like manner communicated to Mr. and Mrs. Burnaby, Beaumont Burnaby, Maria Salisbury, and Sophia Frances Salisbury, and that they in writing approved thereof, &c. The bill then stated the death of James Edward Earl of Malmesbury, as before mentioned, leaving his son, the present Earl of Malmesbury, his heir-at-law, &c.

The defendants to the supplemental bill and bill of revivor, [*61] by their answer, stated, that they were ready and willing, and thereby offered, to execute all such conveyances, and to do and concur in doing all such acts and things as the Court should direct, for giving full effect to the contract.

Mr. *Wigram* and Mr. *G. L. Russell* for the plaintiff.—The point to be made for the defendant is, want of mutuality in the remedy between the parties. But want of mutuality is no objection if it does not exist when the cause is brought to a hearing; *Hoggart v. Scott*,^(a) *Chamberlain v. Lee*.^(b) In *Flight v. Boland*,^(c) it was held that an infant could not enforce specific per-

(a) 1 Russ. & M. 293. [S. C. Taml. 500.] (b) 19 Sim. 444. (c) 4 Russ. 298.

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formance of a contract because the remedy was not mutual ; but there the plaintiff was an infant at the hearing of the cause. If his infancy had ceased before that time, it is apprehended that the decision would have been otherwise : *Clayton v. Ashdown*.(a) Suppose, in the present case, that the plaintiff had had originally no interest whatever, and had subsequently, by a new title, acquired an interest, and then the purchaser had filed a bill against her ; it is clear, that she could not have resisted ; *Hyde v. White*.(b) *Williams v. Carter*.(c) Here, however, the plaintiff had originally a partial interest, and by consent of proper parties is now able to convey the whole interest. She is, therefore, entitled to a decree : *Graham v. Oliver*.(d) At law, a contract for sale of goods to be delivered at a future day is not rendered void by the circumstance that at the time of the contract the vendor had neither the possession of them nor any reasonable expectation of being possessed of them otherwise *than by [*62] purchase after the contract : *Hibblewhite v. M' Morine*.(e) *Mortimer v. M'Callan*.(f)

Mr. *Russell*, Mr. *Chandless*, and Mr. *Fawcett*, for the defendant Hatcher, (after insisting that their client was a stranger to the supplemental bill.)—The defendant did not intend to deal with a person who was not owner at the time of the contract, and could not by the ordinary course of law become owner of the estate. The plaintiff, though tenant for life, only undertakes to deal with the fee. It is said that she has, or can make out, an interest beyond that of tenant for life : but that was mere matter of conjecture at the time of the contract. Until the defendant had repudiated the contract, there was no assent from the other persons. The case of *Graham v. Oliver* was decided on a principle quite inapplicable to this case, viz. that a party who resists the specific performance of a contract shall not by means of his own misrepresentation of his rights succeed in rescinding the contract altogether, if part of it can be performed. *Thomas v. Dering*(g) proceeded on the same principle ; and unquestionably that

(a) 9 Vin. Abr. 393, pl. 1.

(b) 5 Sim. 524.

(c) Sug. V. & P. vol. 1, p. 347 ; Sug. Pow. App. No. 7. (d) 3 Beav. 124.

(e) 5 Mees. & W. 462. (f) 7 Mees. & W. 20. (g) 1 Keen, 729.

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equity may be enforced, although the party so acting cannot enforce the contract or any part of it. But that is one of the excepted cases from the rule as to mutuality. One of the exceptions is, where the defendant has signed the contract the plaintiff not having done so; the other, where the party who seeks the execution of the contract was imposed on by misrepresentation. In all other cases mutuality is the life of specific performance. [The Vice-Chancellor.—Suppose husband and wife, seised in fee in the wife's right, to contract to sell; is there any case which decided that they cannot by bill enforce the contract?] In [*63] that case *the purchaser buys the estate subject to the chance of the wife repudiating the contract. But if the contract of sale states the property to be the husband's, and in the course of the negotiation it turns out to be the wife's, the vendors cannot compel a sale. The same principle must apply to the case of a tenant for life contracting to sell as tenant in fee. "If a tenant for life *bona fide* apprehending that the trustees of the settlement will adopt his contract, sell, meaning only to concur in a sale of the fee, that might be a good defence in equity against a partial execution of the contract by the tenant for life alone. But such sales, where the settlement is concealed, deserve no favor, for there is no mutuality. The trustees, by their election, may force the purchaser to complete, though he cannot compel them to join, and they are too frequently mere instruments in the hands of the tenant for life, who procures them to concur in the sale or to reject it, just as best suits his own views."(a) *Tendring v. London*,(b) *Hamilton v. Grant*,(c) *Howell v. George*,(d) *Kimberley v. Jennings*.(e) In *Hoggart v. Scott*, the parties acquired complete authority to sell before the hearing. The objection to title apparent on the abstract cannot be waived by the subsequent conduct of the purchaser: *Magennis v. Fallon*.(f)

Mr. *Kinglake* appeared for the other defendants.

THE VICE-CHANCELLOR.—In cases of specific performance

(a) Sugd. V. & P. vol. 1, p. 499.

(b) 2 Eq. Ca. Abr. 680. (c) 3 Dow. 32.

(d) 1 Madd. 1.

(e) 6 Sim. 840.

(f) 2 Molloy, 583.

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the want of mutuality is a consideration generally material,[1] but it is contrary to principle and authority to say that perfect mutuality is requisite in order to call a court of equity into action. There are cases in which plaintiffs *have [*64] had a decree for specific performance against defendants, who, when the bill was filed, were not in a condition to enforce specific performance in their own favor. Where no legal invalidity affects the contract, the enforcement of it in this Court is matter of judicial discretion. In this case it has not been contended that there is any legal invalidity. Suppose Mrs. Salisbury to have obtained a legal conveyance of the fee before the time fixed for completion of the contract, and to have done and tendered all other things requisite to be done and tendered. If this were done in sufficient time, she would, I apprehend, have been entitled to recover, at law, on the contract. The contrary, indeed, has not been argued, and I do not understand that on that point the counsel for the defendant desire a case for the opinion of a court of law. If so, this becomes a case for the judicial discretion of the court of equity to which application for specific performance is made.

Now what are the circumstances? Under the will and codicil of Mr. Webb the estate in question was vested in trustees, of whom the late Lord Malmesbury was the survivor, upon trust in the first place to sell for payment of certain debts, which for anything that I know may still be undischarged, and the discharge of which is not, as I am aware, suggested. Subject to that trust, Mrs. Salisbury was equitable tenant for life, with remainder to her children in such shares as she should appoint, with remainder in default of appointment, to her children in strict settlement, with remainders over. Mr. Webb died in 1814. Mrs. Salisbury was entrusted by the trustees very much with the administration (in respect of such matters as she could properly administer) of the affairs relating to the estate. She was allowed to be in an active position as to these trusts, and as tenant for life she was in possession of the estate. Whether

[1] *German v. Machin*, 6 Paige 292. *Withy v. Cottle*, 1 Sim. & Stu. 174. *Helsham v. Langley*, 1 Yo. & Coll. C. C. 179. *Pickering v. The Bishop of Ely*, post, 249, 67.

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the trust reposed in her was so great as to make her in [*65] *effect an agent of the trustees for selling the property I do not say ; but being thus in the active execution of the trust and in the enjoyment of the property, she entered into a contract for sale, which, from the course that the cause has taken, I must consider as beneficial to the estate. In the contract, whether through inadvertence or otherwise (and as this record is constituted it is not material to consider how it happened,) she is treated as tenant in fee : abstracts are delivered, and as early as August, 1839, it appeared from the instruments set out in the abstract that the estate was subject to the uses and trusts created by the will and codicil of her father, uses and trusts subversive at once of the notion that she was or could be tenant in fee, and showing her interest and those of others in the estate to be such as already mentioned. This being done in August, 1839, does the purchaser reject the purchase ? Does he say that he has been deceived and will proceed no further in the matter ? Whether he could have said so effectually it is not material to consider. He does not say so. On the contrary the abstracts were laid before counsel, and very many objections to the title, more or less tenable, more or less weighty, were suggested by the able and distinguished conveyancer whose assistance the purchaser had on this occasion. A correspondence then goes on for several months between the parties, and as late as the 31st of July, 1840, a letter is written by the purchaser's solicitor, explaining why matters had not gone on more promptly on his part, but stating that further papers would be immediately laid before the purchaser's counsel. This occurred on the eve of the long vacation. From some unexplained reason, it appears, that, towards the end of the long vacation, on the 6th of October, without any apparent grounds for so doing, the purchaser rejects the title ; the papers, as far as I can learn, not having been laid before his counsel, according to the promise or statement contained in the letter of the 31st July. This leads to the [*66] *filing of the bill on the 23rd January following. Before, however, the bill was filed, in the most formal manner consents were obtained from the persons whose consents were necessary to meet the requisitions of Mr. Hodgkin. It does not

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appear that all these consents were communicated to the purchaser. That of Lord Malmesbury appears not to have been so, but no difficulty seems to have been suggested on that account.

In this state of things I am asked, on the ground of want of mutuality, to say that the plaintiff is not entitled to any relief. I should be trampling on all principle and authority, if I were to accede to such an argument. Even if the rule of mutuality, as it has been called, could be carried so far as it has been attempted to be carried in a case of this description, which I do not say, still the conduct of the purchaser has been amply sufficient to exclude him from the benefit of any such argument. With full notice of the state of the title, he pursues the investigation of it, and obtains the fulfilment of a requisition made by himself, and founded on the very state of the title.[2] In my opinion, therefore, to relieve him from the contract would, as I have already said, be contrary to all principle and authority, and discreditable to a court of justice. The only question that could be raised in my mind with any chance of success is, the question of the delay that has occurred in completing the title, not with reference to this point alone, but also to other matter. Having regard however to the correspondence, and to the state of the pleadings, which do not suggest this difficulty, I apprehend that point also is not a bar to the plaintiff's title to relief. This appears to me therefore still, as it has appeared from the first moment I was apprised of the facts, a case substantially clear of all difficulty, subject only to the question, whether it was

[2] *Eyston v. Simonds*, 1 Y. & Coll. C. C. 608. In *Hoggart v. Scott*, 1 Russ. & M. 293, as reported, Taml 500, 504, Leach, M. R. said; "Those vendors having acquired the legal authority before the hearing of this suit, there is no objection to a decree for specific performance. The defendant might have retired from the contract on the discovery of the defect in the vendor's title; but he did not do so; he acquiesced in those proceedings which were necessary to clothe the plaintiffs with the legal title, and there is no evidence that reasonable diligence was not used in the Master's office." A purchaser cannot, owing merely to the delay of the vendor in complying with his requisitions, determine the contract without notice, or bring an action for his deposit before the termination of his notice, where time was not originally of the essence of the contract: but whether he can do so after the expiration of notice, where time has not been made of the essence of the contract, or being of the essence of the contract, has been waived, depends upon the conduct of the vendor after notice. *Wood v. Macku*, 5 Hare, 158.

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not safer to bring the parties who are made defendants to the supplemental bill before the court. That they were [*67] necessary parties I do not say, nor is there any *occasion to decide; here they are at present, and, being here, I shall take the consent and undertaking which it appears they have been and are willing to give.[1] Therefore—

THE defendants to the supplemental bill consenting to confirm and give effect to the contract, and to do all such acts as may be necessary to give effect to it, and the counsel for Mrs. Burnaby not objecting to the decree, refer it to the Master to inquire and state whether the plaintiff with the concurrence of the defendants, or any and which of them, can make a good title according to the contract, and if so, when that good title was first shown. Liberty to state special circumstances. Reserve the question of costs. Let the decree be drawn up in both suits.

MORTON V. TEWART.

1842: Dec. 16th.

A person who occupied a large farm as tenant under a lease, fell into difficulties and surrendered his lease to his landlord. The tenant had by means of his private expenditure increased the value of the property by about the rate of £100 per annum. The brother of the tenant's wife then applied to the landlord to become tenant of the farm for the residue of the term, at the rent and under the covenants comprised in the surrendered lease. This application was made by letter, in which the writer stated it to be his wish to be of use to his unfortunate sister and her young family, and spoke of his disinterested motives. The application was acceded to by the landlord with the sole view, as he stated in his evidence, of benefiting the sister and her family. By a subsequent arrangement, it was agreed that a third person should be joined as lessee with the brother, who should manage the

[1] The general rule is, though subject to many qualifications, that a vendor filing a bill for a specific performance, is entitled to a decree in his favor, if he can make a good title to the purchaser at or before the time of the decree. *Hepburn v. Dunlop*, 1 Wheat. 179. *The Reformed Protestant Dutch Church v. Mott*, 7 Paige 77. *Baldwin v. Salter*, 8 Paige 474. *Hoggart v. Scott*, 1 Russ. & M. 293. S. C. Tamb. 500. *Egerton v. Jones*, 1 Russ. & M. 694. *Portman v. Mill*, Id. 696. *Coster v. Turner*, Id. 311. *Bennet v. Rees*, 1 Keen, 408. *Sidebotham v. Barrington*, 4 Beav. 110. *Dalby v. Pullen*, 3 Sim. 29. *Chamberlain v. Lee*, 10 Sim. 444, 50. *Eyston v. Symonds*, 1 Yo. & Coll. C. C. 608. 2 Story's Eq. § 777. *Seymour v. Delancy*, 3 Cowen, 446. *Hepburn v. Auld*, 5 Cranch, 262. *Woodcock v. Bennet*, 1 Cowen 711.

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bulk of the property, and give the brother 55*l.* per annum for his occupation, the brother underletting the residue of the property. In his letters respecting this arrangement the brother expressed himself as having taken the farms with no selfish motives, but from a wish to assist his sister and her unfortunate family. This arrangement was acted upon until the brother's death; the brother for some years receiving the 55*l.* (which was secured to him by the bond of his co-lessee) and underletting the residue of the premises at 45*l.* per annum:—*Held*, that, by means of the letters (which the Court considered to be a sufficient manifestation in writing within the Statute of Frauds,) aided by parol evidence of the circumstances under which they were written, a trust was created of the annual sums of 55*l.* and 45*l.* in favor of the sister and her children, and (the husband waiving all interest therein) that the sister and her children took as joint-tenants.

For several years previously and up to the year 1827, the defendant Henry Morton occupied certain farms called the Kilham estate, as tenant to the Earl of Tankerville, under a lease of which several years were unexpired in the year 1827, at the yearly rent of £1400. In the course of his tenancy he laid out considerable sums of money upon the premises; particularly a sum of £2000, which was expended on the premises shortly before the surrender of the lease as after mentioned.

*In the early part of June, 1827, Morton had fallen [*68] into pecuniary difficulties, and on or about the 11th of June, 1827, he executed a general assignment of his effects for the benefit of his creditors, which however did not include his interest in the lease held by him under Lord Tankerville, inasmuch as that case contained a clause of forfeiture on assignment without the consent of the lessor, and Lord Tankerville refused to permit such assignment to be made. About the same time therefore at which the general assignment was made, the lease was duly surrendered to Lord Tankerville.

In the month of October, 1827, Mr. John Langhorn, the agent of Lord Tankerville, advertised the premises to be let, whereupon Matthew Culley, who was the brother of Mrs. Morton, the wife of the defendant Henry Morton, wrote a letter to Mr. Langhorn dated the 24th of October, 1827, a part of which was as follows:—

“My dear Sir,—I am at present engaged in an inquiry to ascertain whether I can take Mr. Morton's whole concern upon myself, but I must confess to you in candor, that so far as I can

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at present judge, I cannot do so. Mr. Grey tells me you are about to advertise Kilham, and I dare scarcely ask you to suspend it for a few weeks."

In answer to this letter, Culley received a letter from Langhorn to the effect that it was impossible to delay advertising the premises to be let; Culley accordingly wrote another letter to Langhorn dated the 5th of November, 1827, which was as follows:—

"My dear Sir,—I duly received your sensible reply to my application for a delay in the advertising of Kilham. I am perfectly satisfied that yours was the correct view of the subject. As it is my wish to be of use to my unfortunate sister and her young family, I am tempted to risk requesting a great [*69] favor of Lord Tankerville; viz. to take *me as tenant of Kilham on the present conditions for the remainder of the lease, with a power to sublet. I am aware I have no claim to such a favor from Lord Tankerville, except that arising betwixt a very old tenant and landlord. Will you have the goodness to make this request known to Lord Tankerville with as little delay as possible, and to explain my object to his Lordship, as he must be ignorant of my disinterested motives. I am, &c."

Immediately after the receipt of this letter, Langhorn communicated the contents to Lord Tankerville, who in reply wrote a letter to Langhorn dated the 15th November, which was as follows:—

"Dear Sir,—I return you in this and another cover the three letters as you desire. I cannot consent to give the power of subletting Kilham, but if Mr. Culley is desirous of taking it, placing himself in the shoes of Mr. Morton, with the view, as he states, of benefiting Mr. Morton's family and becoming himself my tenant, I will not object. We let the farm to Mr. Morton at a time when we thought we could make more of it, because he was an old tenant, and we knew him to be an excellent cultivator. Now that the farm is thrown on our hands at a less favorable period, I have a right to look for my compensation in the chance of what I may be able to make of it on the return of more favor-

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able times now, or at any later period. In allowing Mr. Culley, therefore, to occupy it during the remainder of the lease on the same terms as Mr. Morton, I am doing, I believe, all I could be expected to do for the benefit of Mr. Morton's assignees in respect of the money laid out, without giving them also the benefit of the speculation in case of more profitable times. It is not necessary, perhaps, to enter into this explanation with Mr. Culley, though I should like that he should be satisfied with the justice of *what I propose; and this appears to me the [*70] fair view of the question—Yours, &c. TANKERVILLE."

The material contents of this letter having been communicated to Culley, he agreed to become tenant of the premises upon the terms of it, without a power of subletting, and accordingly a memorandum of agreement, founded on that letter, was on the 17th November entered into between Langhorn, on the part of Lord Tankerville, of the one part, and Culley of the other part.

In the early part of the month of March, 1828, Culley entered into an arrangement with Hugh Boag of Yetlington in the county of Northumberland, farmer, the nature of which will be seen from the following letter dated the 6th of March, 1828, from Culley to Langhorn.

"Dear Sir,—I beg to inform you that I have made an arrangement with Mr. Hugh Boag of Yetlington which would relieve me from the trouble of managing Kilham. He is a wealthy and most respectable young man, he will allow me £100 *per annum* in consideration of the capital expended by Mr. Morton, provided that Lord Tankerville will do as the late Lord Tankerville did with regard to Dawson and myself at Wark, viz. grant us a joint lease and leave us to make our private arrangements. This still holds me jointly or separately responsible to Lord Tankerville. In the different situations in which Lord Tankerville and myself are placed, it is not very probable that I may have an opportunity of returning so great a kindness. I do not, however, feel inclined to rest satisfied with the dictum of some moralist who says that to feel gratitude is to pay it. I should prefer a practical morality. I set out for Sutherland this day and shall be absent nearly three weeks. I am, &c."

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Shortly after the receipt of this letter, Mr. Langhorn communicated its contents to Lord Tankerville, who replied by [*71] letter dated the 18th March to the effect that, though *he was generally averse to the plan of subletting, yet in this instance he was disposed to give way to Mr. Culley for the benefit of Mr. Morton's family, it being understood that Mr. Culley's security should continue, and due provision should be made for the proper cultivation of the estate.

It being afterwards proposed on behalf of Lord Tankerville that a clause should be introduced into the lease binding Mr. Culley to lay out an additional sum in improvements on the premises, Mr. Culley wrote to Lord Tankerville a letter dated the 4th May, 1828, which was in part as follows:—"It was stated to your lordship that my inducements in taking these farms arose from no selfish motives or personal interest, but from a wish to assist my sister and her unfortunate family, and I felt that I had justice also on my side, as Mr. Morton had expended between £2000 and £3000 on these grounds, generally in fixed and permanent improvements. Had, however, the trustees continued the lease, this expenditure could not have benefited your lordship during that period: I therefore conjectured that seeing it in this point of view your lordship would be induced to allow me to receive the interest of this money so expended during the residue of Mr. Morton's lease. I therefore entered into a written agreement with your agent to have the farm precisely on Mr. Morton's terms. On talking matters over with him, I willingly agreed to alter the rotation from Mr. Morton's system of only one year in grass to two, as better adapted to such soils. I also consented, &c. &c. I am promised but £100 *per annum*, which is not a business return for £2000 sunk, &c. I do not therefore see how your lordship can ask for greater concessions, more especially when I inform your lordship that I proceeded to make an arrangement with some eligible person, which I have done upon the conditions agreed on between your agent and myself, and seemingly guaranteed by your letter; and the man, a most worthy and active young *person, had absolutely taken possession by several acts (sowing grass seeds, hiring servants &c.) before your lordship made this claim. It is quite evi-

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dent, therefore, that if such conditions are imposed upon him, I must be the sufferer; because now he cannot throw up the bargain, nor can I enter upon the farm. Time is too far gone for either alternative. If these conditions are imposed upon him, and repaid by me, then I shall be held responsible to your lordship for sixteen years for rent and conditions, without any adequate remuneration for such risk to myself or premium for such assurance to your lordship, which is manifestly unjust: neither would my unfortunate sister and her family receive any return for Mr. Morton's expended capital."

In consequence of this letter, Lord Tankerville's proposition for additional expenditure on the property was abandoned, and by an indenture dated the 13th May, 1828, between Lord Tankerville of the one part, and Matthew Culley and Hugh Boag of the other part, Lord Tankerville demised the Kilham estate to Culley and Boag, their executors, &c., to hold, &c. from the 13th May, 1828, for the term of sixteen years, at the yearly rent of £1400, payable by half-yearly payments, and the additional rent of £10 an acre for every acre of the premises managed contrary to the covenants thereafter contained on the part of the said Matthew Culley and Hugh Boag, and subject to the covenants, conditions, and agreements, in such indenture contained.

By an arrangement between Boag and Culley, Boag paid to Culley the annual sum of £55, instead of the £100 previously agreed upon, and gave Culley his bond for the punctual payment of the £55. The remaining portion of the £100 was raised by means of an under-lease by Mr. Culley, of part of the premises, called Branston; Boag being in receipt of the rents and profits of all the premises comprised in the demise except the part so underlet.

*Culley died in April, 1834, having by his will appointed [73] Edward Tewart and others his executors, who took possession, and received the rents and profits of that part of Kilham which was underlet.

The bill which was filed by Mrs. Morton against the executors of Mr. Culley, and the husband and children of Mrs. Morton, alleged, that under the circumstances aforesaid, the indenture of lease, to the extent of the interest of the testator, Matthew

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Culley therein, and the bond so executed by Hugh Boag, were held by the testator Mathew Culley in trust for the plaintiff and her children; and that the several sums received by Culley and his executors from Hugh Boag, and the rents of the premises called Branston, belonged to the plaintiff and her children, but that neither Culley nor his executors had so applied the same, or rendered any account. And the bill, after charging that the lease was obtained by Culley from Lord Tankerville, upon the express understanding that it was to be held by him for the benefit of the plaintiff and her family, prayed that Culley might be declared a trustee as before mentioned, and that an account might be taken of the monies so received; and that the same might be paid to the plaintiff, to her separate use, to be applied for the benefit of herself and her children, or otherwise, as the Court might direct; and that, if necessary, a deed of trust might be executed, and for receiver, &c.

The defendant Tewart, (who answered separately from the other executors,) by his answer, insisted that the circumstances stated in the bill did not raise such a contract of trust on the part of Matthew Culley as could have been specifically enforced against him; and that the letters written by him did not constitute a valid or binding declaration of trust. And he relied on the 7th section of the Statute of Frauds.

The cause now came on for hearing.

The plaintiff proved, by the evidence of Mr. Langhorn, [*74] *that the premises, when advertised to let, were, by reason of the improvements made on them by Henry Morton, worth more than the yearly rent of £1400, the additional worth being, in the deponent's estimation, about £100 *per annum*. The same witness deposed to the affectionate terms on which the plaintiff lived with her brother, and his frequent declarations of being desirous to become tenant of the farm, solely with a view of applying the profits to the maintenance of his sister and her family. The plaintiff also read the evidence of Lord Tankerville, who stated that he let the farm to Mr. Culley at the rate of £1400 *per annum*, which was a less sum than he might have obtained for it, solely in consideration of the profits

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being applied by Mr. Culley for the benefit of his sister and her children.

In further support of the plaintiff's case, Mr. Culley's ledger was put in, containing various entries in his own handwriting as to the Kilham estate. Amongst these was the following entry to the credit of Mrs. Morton :—" 1828, to a half-year's rent of Branston, November 10th, 22*l.* 10*s.*"

It was admitted that, during the time of the correspondence before stated, the plaintiff had five children, all of whom were under age. They were made defendants in this suit.

Mr. *Russell* and Mr. *Hall*, for the plaintiff.—Assume that this is a case in which the Statute of Frauds applies. In October, 1827, the parties were in this situation. The plaintiff and her children had no legal claim on Lord Tankerville, but a large sum of money had been expended by Morton upon the farm. Culley applies to Lord Tankerville not to acquire any benefit for himself, but to benefit his sister's family; and Lord Tankerville's agent establishes that the agreement was entered into with Mr. Culley solely on the faith of these representations, and Lord Tankerville *says he would not have [*75] granted the lease on any other terms. If a person induces another to give him an interest in property in consideration of a benefit arising to a third person, it would be a fraud in the donee to apply the property to his own use. We do not seek to enforce a voluntary trust against Culley's land, but a trust founded on a pecuniary consideration : *Dundas v. Dutens*.(a) There is evidence in writing of the trust under Culley's own hand. First, there is the application which he makes with a view to relieve "his unfortunate sister and her family." Then after the agreement is signed, there is the letter of the 6th March, which states the consideration, viz. £100 *per annum* in consideration of the capital expended on the farm by Morton. Then there is the letter of May, in which he states to Lord Tankerville that his inducement for taking the farm arose not from any selfish motives, &c. These documents may not alone be sufficient to establish the trust, but they are so when taken with the other evidence

(a) 2 Cox, 235.

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in the cause: *Cripps v. Jee*.(a) [*The Vice-Chancellor*.—The other evidence may be of this value—namely, to give credit to the documents, and to show that they were not voluntary documents, but enforceable: *Gardner v. Rowe*.(b) *Milner v. Singleton*.(c)]

Mr. *Craig*, for the plaintiffs Henry Morton and the children, admitted on the part of Henry Morton that the [*76] *trust, if established, was for the separate use of the plaintiff during his life.

Mr. *Wigram* and Mr. *Colville*, for the defendant Tewart.—The intention of the parties was that Mr. Culley should be *dominus* of the bounty. Culley was to have an inducement to do something for Mrs. Morton and her family. Is there anything in the documents which binds Culley to employ the whole rents and profits for his sister's benefit? And from what time did the supposed trust arise? What is there in these letters to show a trust constituted and executed (for it must be that) for the sister and her family? It was mere charity and benevolence in Lord Tankerville to increase Mr. Culley's means of benefiting his sister. The case on the other side mainly depends on the words "no selfish motive or personal interest," &c. But, on those words, could the sister call on Culley for every portion of the rents? Besides, there is nothing which shows with certainty to whom he was to account. The precise terms of the trust

(a) 4 Bro. C. C. 472.

(b) 5 Russ. 258.

(d) Not reported. In this case Singleton had obtained a lease from the Dean and Chapter of York. Milner alleged that he had obtained it under a secret trust for himself. Singleton denied the imputed trust, and said that he took the lease in his own name and refused to give Milner the benefit of it except upon his own terms, which Milner refused. Milner then filed his bill to establish the alleged agency of Singleton for him. The *Vice-Chancellor of England* in the first instance, and afterwards Lord *Cottenham*, C., directed issues to try the fact of agency, and directed both the plaintiff and defendant to be confronted before a jury.[3] The issues were tried at York, in March, 1841, when a verdict was found on each issue for Milner.

[3] As to permitting parties to be examined on the trial of an issue, see *Parker v. Morrell*, 2 Phillips 453.

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should appear in writing: *Forster v. Hale*.^(a) Lastly, the plaintiff is bound by lapse of time.

Mr. *Purvis* and Mr. *Toller*, for the other executors.

Mr. *Russell*, in reply.

The following cases were also mentioned: *Chambers v. Waters*,^(b) *Colyear v. Countess of Mulgrave*,^(c) *Wheatley v. Purr*,^(d) *Ex parte Pye*,^(e) *Meek v. Kettlewell*.^(f)

THE VICE-CHANCELLOR.—The question of the applicability of the Statute of Frauds to an interest such as that claimed by the plaintiff, is one that I need not decide, and one that I desire not to be understood as deciding; because, *in my [*77] judgment, Mr. Culley's letters which are in evidence—letters bearing his signature—satisfy the requisitions of the statute, if the statute applies. In that view of the case, the rest of the evidence must be considered as received for the legitimate purpose of showing the position in which Mr. Culley stood when he wrote them, the circumstances by which to his knowledge he was then surrounded, and the degree of weight and credit which, independently of any question of construction, may belong to those letters.

It appears that Mr. Morton, who had married Mr. Culley's sister, was the tenant of a large farm at as high a rent as £1400 a year, under Lord Tankerville. He held by a lease, of which more than twelve or fourteen years were unexpired. He had made a large expenditure upon the farm, in respect of which expenditure it appears to be agreed on all hands he had not held the farm long enough to remunerate himself, but the remuneration in respect of which he might reasonably expect to derive during the residue of his term.

He fell into difficulties. His property appears to have been assigned to trustees for the benefit of his creditors; but the farm

(a) 3 Ves. 696.

(d) 1 Keen, 551.

(b) Ca. t. Broug. 91.

(e) 18 Ves. 140.

(c) 2 Keen, 81.

(f) 1 Hare, 464.

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was not capable of being assigned, as I collect, without the consent of Lord Tankerville, whose steward would naturally look with particularity as to the mode in which so important a farm should be occupied; nor were the trustees of his estate for the benefit of his creditors willing to undertake the responsibility and risk of such an occupation. In substance, therefore, the farm was of necessity relinquished to Lord Tankerville. The steward of the estate, in the execution of his duty, took means for re-letting the farm. This, of course, was a great loss to Mr. Morton's estate, and the heavier under the circumstances of embarrassment in which he was placed. Lord Tankerville however, though thinking it necessary that the farm should be [*78] re-let, yet with those feelings, the general *prevalence of which between a great landed proprietor and his tenants is one of the happy distinctions of this country, was desirous, if possible, not to avail himself of Morton's expenditure, but to let his family have the benefit of it.

Mr. Culley, a considerable tenant of Lord Tankerville, and apparently a most respectable person, was the brother of Mrs. Morton, and naturally interested for his sister and her children. It appears that at that time Mrs. Morton had several children, all of whom were under age, and was placed, as might be expected, in a position of considerable distress. Mr. Culley, therefore, commenced a correspondence with Mr. Langhorn, (Lord Tankerville's steward,) with a view of taking the farm himself for the purpose of assisting his sister and her family.

This proposal was received favorably by Lord Tankerville, and negotiations were entered into, which were unavoidable, considering the nature and extent of the property, and ultimately it was arranged that Mr. Culley should be considered as the tenant. To relieve himself, however, to a certain extent from the fatigue and anxiety of the management of the farm, Mr. Culley associated himself with a young farmer of respectability of the name of Boag, who it appears was to occupy the bulk of the farm at his own risk, and for his own profit, rendering yearly rent in respect of it to Mr. Culley, who was to be treated as the owner, as far as there could be ownership under a lease, of the residue of the farm; provided that, if Mr. Boag himself oc-

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cupied that portion of the farm, he was to pay Mr. Culley a rent for it; so that, in effect and substance, the arrangement made was this—that Mr. Boag should have the benefit of the lease, make all he could of it at his own risk, and give to Mr. Culley benefits out of it to the extent of about £100 a-year; and the question, whether these benefits were taken by Mr. Culley *for his own benefit, to be used by himself at his own [*79] arbitrary discretion, or were taken by him as a trustee for Mrs. Morton and her family—is the question in the cause.

The letters appear to me to afford sufficient evidence of a trust; and, as I said before, the other circumstances are to be taken into consideration, only for the purpose and to the extent which I have mentioned.

It is plain that the accepting Mr. Culley as a tenant, and the agreeing to a certain mode of arranging that tenancy, were not originally very acceptable to Lord Tankerville, or consistent with the ordinary mode of management adopted on his estates. Lord Tankerville's wish, however, was to benefit the family of the late tenant, whose money had improved the farm. The farm was accordingly let to Mr. Culley at £1400 a-year, the same rent that Mr. Morton paid, though it is agreed on all hands that it was worth considerably more than that rent, having been rendered worth more by Mr. Morton's expenditure. Those were Lord Tankerville's view and motives; we know, from his own evidence, that Lord Tankerville would not have thus acted except with the view of benefiting Mrs. Morton and her family.

Now, the same views are expressed in the letters of Mr. Culley himself; they are not formally or technically written letters, which it is not likely they would have been, but they are the letters of a sensible man, and a man of business, and a kind relative.

From the language of those letters, you may collect that he had no selfish object in taking the farm; that he did not look to his own personal benefit, but that his views were to assist his sister and her family.

Now, it is said that I am to consider those expressions as indicative not of anything that was to bind him, but as indicative merely of this—that his means of charity were to be increased; that the matter was to be left not *only to his [*80]

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own arbitrary will and discretion, (which probably might have been trusted,) but to the arbitrary will and discretion of those who might come after him. Mr. Culley was much too sensible a man not to be fully aware of the uncertainty of human affairs, and that such an arrangement would ensure no benefit of any kind to Mrs. Morton and her family, but would probably leave her to the caprice, or at the mercy of others—a thing quite contrary to the views and intentions of Lord Tankerville, who, if the family were to be placed at the discretion of any person, would naturally have wished (as they themselves would have wished) them to be placed at *his* discretion—at the discretion of a kind, forbearing, and generous landlord, and not as the recipients of the casual and arbitrary bounty of a relative, whose views and intentions might be changed by a variety of circumstances, and whose death might place the administration of his affairs in the hands of strangers. It is not *lhy lks ea tutch* should have been the intention of the parties.

Verba intentioni debent inservire. I must construe the words of the documents, but in so doing I must give effect to the intention and views of the parties as far as I can. When I find the intention and views of the parties require a positive trust—not a mere claim upon the feelings and honor of Mr. Culley, which might at any time be disappointed either in his lifetime or after his death—is not the Court required to hold a declaration of the absence of interest, and of the absence of selfish motives, and the fact of this property being taken with a view to assist his sister and her family—as a positive declaration that the interest thus acquired was to be and should be so held? In my opinion it is emphatically a trust—clearly manifested in writing, and signed by the party.[1]

[1] *McFadden v. Jenkyns*, 1 Phillips, 153, 7, n. 1, 2; S. C. 1 Hare, 458. *Bayley v. Boulcott*, 4 Russ. 345. *Benbow v. Townsend*, 1 Myl. & Cr. 506. *Meek v. Kettlewell*, 1 Hare, 464. *Hughes v. Stubbs*, Id. 476. A declaration of trust is valid, although executed after bankruptcy of the trustee making the declaration. *Gardner v. Rowe*, 5 Russ. 258. "A trust need not be created by writing, but it must be manifested and proved by writing. The nature of the trust and the terms and conditions of it must sufficiently appear; so that the court may not be called on to execute the trust in a manner different from that intended." *Woodworth, J. Whelan v. Whelan*, 3 Cow. 580.

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The trust, however, must be shown to be certain in its nature and in its object; otherwise it must fail. For whose benefit such a trust would fail, if it were to fail, *is a [*81] question upon which it is not necessary to give any opinion.

The farm at Kilham is mentioned in the letters, which and the other evidence, legitimately receivable, clearly show what the farm at Kilham was. The subject indeed is beyond all question clear, and the contrary has not been contended.

The objects of the trust are equally plain. Whether the true construction of the letters is to give Mrs. Morton an interest for her separate use it is not necessary for me to decide, and I give no opinion upon it. I have taken the consent and undertaking of Mrs. Morton at the bar, that all her interest shall be dealt with and treated as for her separate use; avoiding therefore any judicial construction upon that point. What is the meaning of the word "family?" It is a flexible expression. The meaning to be attributed to it must depend upon the circumstances of each particular case. A state of things may exist in which the Court may be unable to put a construction upon so large and general an expression. Other cases undoubtedly exist in which it is easy to give it a definite and plain meaning. In this case Mrs. Morton had at the time several young children requiring assistance, and dependent upon their parents or one of them: and looking at the whole of the letters together, and the facts which may be legitimately regarded upon a question of construction and at those only, I am opinion that the word "family" here means "children;" and that the trust declared is for the benefit of Mrs. Morton and her children then living. Whatever inclination one might feel not to hold that the mother and children took as joint-tenants under those words, the law is, I think, too strong to enable any conjecture as to any other possible meaning that might have been present to the mind of the parties, to interfere with the settled rule of interpretation upon that point.[2] I am of opinion *therefore that [*82]

[2] A sum of money was remitted to England to be secured for the benefit of a married woman and her children, so that the same might not come to the hands of

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the mother and her children must be held to have taken as joint-tenants.

DECLARE therefore that all the benefits which were taken by Mr. Culley under the agreement and lease or either of them were taken as trustee for the benefit of Mrs. Morton and her children then living; and upon the consent of the husband, let him be excluded, in favor of the separate use of the wife, from all participation in the benefit of the said lease and agreement or either of them. Let an account be taken of what Mr. Culley and the executors have received, giving Mr. Culley's estate the benefit of all just allowances.

With respect to the argument upon the question of the lapse of time, after giving it considerable attention, I do not think that there is sufficient ground for it.

As to the word "family," see *Liley v. Hey*, 1 Hare, 580. As to a gift of personality to A. and her children, see *De Witte v. De Witte*, 11 Sim. 41.

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1842: Nov. 25th.

To entitle confidential communications to the protection which is ordinarily extended to them in a suit, it is not necessary that they should have been made in contemplation of the suit: it is sufficient if they relate to and were made in the course of the dispute which is the subject of the suit.

THE bill prayed a discovery touching certain matters in which the defendants Lawrence Phillips, Samuel Phillips, and Eugene Larrieu were prosecuting the plaintiff by an action at law, and for an injunction to restrain the proceedings at law until answer.

The case as represented by the bill was as follows:—Rogers & Gray were in partnership as merchants at Richmond, in the United States, under the firm of Rogers & Gray. Rogers also carried on business at Havre, where he resided, under the firm of Lewis Rogers & Co. The defendant Larrieu was a merchant in Paris, and the defendants L. and S. Phillips were merchants in

her husband; it was held that the mother and children took as joint-tenants. *Bustard v. Saunders*, 7 Beav. 92, and see *Wilson v. Maddison*, post, 372.

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London under the firm of Jonas Phillips & Sons. Rogers & Gray Lewis Rogers & Co. and Larrieu, were for some years the correspondents *of Warwick, a tobacco merchant in London. [83] In 1835 a joint adventure was entered into between Warwick, Rogers & Gray, Lewis Rogers & Co., Larrieu and Jonas Phillips & Co., for supplying the English and French markets with tobacco. The tobacco was to be purchased by Rogers & Gray in America, and was to be consigned to Lewis Rogers & Co. at Havre, who were to have the absolute disposal and sale of it for the benefit of all parties. Accordingly, Rogers & Gray purchased and paid for tobacco to the amount of £360,000, and the whole, with the exception of a small parcel which was sent to London, was sent with the bills of lading to Lewis Rogers & Co. The tobacco not finding a sufficient sale in France was forwarded by Lewis Rogers & Co. to Warwick in England. On the arrival of the vessels in England, Rogers & Gray commenced drawing upon Warwick in reimbursement. Warwick in the first instance paid the bills, but there being no market for the tobacco, he was afterwards obliged to pledge certain of the warrants in order to raise money for payment of the bills. Pending these transactions, and in October, 1836, the plaintiff entered into partnership with Warwick. To meet the payment of the loans raised on the security of the warrants, the firm of Warwick & Clagett repledged those warrants and pledged others. The pledging of the warrants was afterwards known to and approved of by Rogers and Larrieu. In the spring of 1837 Warwick & Clagett became bankrupt. About the same time, the defendants Phillips and the defendant Larrieu commenced actions at law against the holders of the warrants to recover the value of the warrants; some of which actions were pending at the filing of the bill and some had been compromised. In September, 1837, Clagett obtained his certificate. In June, 1842, the defendants L. and S. Phillips and Larrieu commenced an action against the plaintiff to recover from him the value of the tobacco.

The defendants severed in their defence to the bill.

*The defendants L. and S. Phillips by their answer [84] stated that they had in the second and third schedules

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to their answer set forth lists of deeds, &c. in their possession relating to the matters in the bill mentioned, which however they denied would prove the allegations in the bill. "And these defendants further severally say, that in the second part of the said third schedule they have enumerated certain documents which are, as to part of them, papers and proceedings in and relating to the said actions against Messrs. H., &c. (the holders of the warrants,) and to the said action so commenced and prosecuted by these defendants and the said Joseph Eugene Larrieu against the complainant and now pending as aforesaid; and as to the remainder thereof, the same are confidential communications which have passed between these defendants or one of them and Messrs. T. & Co. their attorneys in the said actions against the said Messrs. H., &c., and the said complainant, with reference to the said actions and to the questions in dispute therein, before and subsequent to the commencement thereof, and confidential communications which have passed between these defendants or one of them and Messrs. A. & Co. their present solicitors, with reference to the said actions and this suit, and the matters in question therein respectively before and since the commencement of the said actions and suit respectively. And these defendants submit, that the several documents mentioned and contained in the second part of the said third schedule hereto are privileged, and that these defendants ought not to be compelled to produce them or any or either of them."

The defendant Larrieu by his answer, after admitting the possession of documents relating to the matters in question, alleged, that the several books and documents set forth and described in the third part of the schedule to his answer, were all private and confidential communications between him and [*85] his solicitors and agents and his counsel, in reference to his rights either alone or jointly with the firm of Jonas Phillips & Sons, against the plaintiff and the said Messrs. H. &c., on account of the matters therein mentioned and the means of enforcing the same; and that the said books did not contain any entries or communications relating to the matters therein mentioned, other than such private or confidential communications. "And this defendant saith, that the several documents therein

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described as cases and opinions, are cases which have been prepared by this defendant's solicitors to submit to counsel for their guidance in the proceedings instituted for recovery of the value of the said tobacco against the said complainant and the said Messrs. H., &c., together with the opinions of counsel on the said cases : and the several documents which are described as briefs or proceedings at law, are briefs and proceedings in the several actions at law hereinbefore mentioned to have been instituted by this defendant for the recovery of the said value of the said tobacco. And this defendant saith, that he and the said Lawrence Phillips and Samuel Phillips, from and before the first commencement of the said proceedings in the said several actions, always contemplated suing the said complainant and the said William Sidney Warwick, and holding them liable in respect of any amount which they might not be able to recover from other parties : and the said briefs, documents, and other proceedings have been prepared and written since the questions now in dispute between the said complainant and this defendant commenced, and with a view to legal proceedings against the said complainant and the said William Sidney Warwick for the recovery of the balance of the value of the said tobacco ; and the same contain and are in fact private and confidential communications between him and his solicitors and counsel in reference to this defendant's rights against the said complainant, and his best means of enforcing the same." And the defendant insisted that he was not bound *to produce the documents [*86] comprised in the third part of the schedule.

Mr. *Roundell Palmer*, for the plaintiff, now moved for the production of the documents scheduled in the defendant's answer ; observing, that it was absolutely necessary for the party claiming the protection arising from confidential communications, to state that they passed with reference to or in contemplation of the present proceedings. No such statement, he contended, was made in these answers. All that was stated amounted to this—that the papers had been used in the actions, and were confidential. He cited and commented upon the following cases ;

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Hughes v. Biddulph,^(a) *Vent v. Pacey*,^(b) *Garland v. Scott*,^(c)
Greenough v. Gaskell,^(d) *Storey v. Lord George Lennox*,^(e)
Desborough v. Rawlins,^(f) *Nias v. North Eastern Railway*
Company,^(g) *Greenlaw v. King*.^(h)

Mr. *Heathfield* and Mr. *Roll* appeared for the respective defendants.

THE VICE-CHANCELLOR, in the course of the argument, said, that where a dispute had arisen between two parties, which might, unless amicably adjusted, terminate in a suit, there, if confidential communications with professional men passed in the course of the dispute, they would be privileged, if litigation ensued, though litigation might not have been contemplated at the time when the communications took place.[1]

ORDERED, that the defendants produce the documents mentioned in the schedules to their answers, except confidential communications between the plaintiffs at law, or any of them, or any person on their or any of their behalf, on the one hand, [*87] and the attorneys for the plaintiffs in the *actions at law, defendants in the present suit, or the counsel in the actions and in the present suit, in those characters, on the other hand, relating to the actions or either of them, or to the present suit, or both relating to and being in the course of the dispute which formed the subject of the actions and suit. Affidavits to be made to specify the communications which come within this description. * * *

Either party to be at liberty to apply to extend the protection granted as to confidential communications, if so advised, and the plaintiff in equity to be at liberty to apply on the affidavits or otherwise.

 (a) 4 Russ. 190.

(b) Id. 193.

(c) 3 Sim. 396.

(d) 1 M. & K. 98.

(e) 1 Keen, 341.

(f) 3 M. & Cr. 515.

(g) 2 Keen, 76; 3 M. & Cr. 355.

(h) 1 Beav. 137.

[1] The principle of the above decision was amply confirmed by Lord Lyndhurst in *Herring v. Cloberry*, (Feb. 1842,) 1 Phillips, 91, and in the more recent cases of *Holmes v. Baddely*, (Nov. 1844,) Id. 476. Reversing the judgment of the Master of the Rolls, 6 Beav. 521, and in *Carpmael v. Powis*, (March 1846,) 1 Phillips, 687, S. C. 9 Beav. 16. The same principle was also pursued by Vice-Chancellor Wigram, in *Lord Walsingham v. Goodricke*, (July 1843,) 3 Hare, 122. As a leading case on this subject, see *Bolton v. The Corporation of Liverpool*, 1 Myl. & K. 88. S. C. 3 Sim. 467. *Greenough v. Gaskell*, 1 Myl. & K. 98; S. C. Coop. Sel. Cas. 96. For further authorities on the general subject of confidential communications, see the Editor's notes, 1 Phillips, 96, n. 2; 483, n. 2; 686, n. 3; 692, n. 2. *March v. Ludlum*, 3 Sand. Ch. Rep. 35, 45, et seq. *Coverly v. Tamahill*, 1 Hill, 33. *Crosby v. Bergen*, 11 Paige, 377. *Steele v. Stewart*, 13 Sim. 533.

1842.—Stephens v. Lawry.

STEPHENS V. LAWRY.

1842: Dec. 5th, 6th.

Testator bequeathed an annuity to his granddaughter, to be applied whilst she was under age in and towards her maintenance and education, in such manner as his trustees should in their absolute and uncontrollable discretion think fit, and whether her father should be able to maintain and provide for her or not. The trustees having made a very small payment on account of the annuity, and having made no provision for the maintenance or education of the infant, who had been wholly provided for by her father, the Court declared that, in the event of its appearing that the father had properly maintained and educated the infant from the testator's death, he should receive the whole annuity for the time past and till further notice; he undertaking properly to maintain and educate her, and to abide by the order of the Court.

E. FLEMING, by his will, after giving various pecuniary legacies (amongst which was a legacy of nineteen guineas to his son-in-law John Stephens), gave all his real and personal estate to his executors, upon trust (subject to certain specific bequests to his wife) to sell and get in the same, and invest the proceeds on real or government securities, and receive the interest and dividends thereof.

The testator then, after giving his wife an annuity for life, gave to his granddaughter Sophia Stephens, the daughter of the before-named John Stephens, an annuity of £40 during the joint lives of herself and his said wife, payable out of the dividends, interest, and annual produce of his estate, and to be applied whilst she should be under the age of twenty-one years and unmarried in and towards her maintenance and education, and for her benefit and advantage and in such manner as his trustees should in their absolute and uncontrollable discretion think fit, whether John Stephens her father should be able to maintain and provide for her or not: the first payment thereof to be made at the end of one year after the testator's *decease. And the tes- [*88]
tator after the death of his said wife gave to his said granddaughter £2000 if then living, and if and when she should attain the age of twenty-five years or be married, with a direction to the trustees to apply the dividends, interest, and annual produce thereof whilst she should be under twenty-five years of age in and towards her maintenance &c. (using the same words as

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to absolute discretion &c. as before); the surplus to accumulate and to be added to the principal : and if she died under twenty-five, the said sum with its accumulations was to fall into the residue ; and if she married under that age, both the annuity and a certain share of the £2000 and its accumulations were to be settled upon the husband and wife and the issue, in such manner and form, and subject to such powers and provisions as should be valid in law, and as the trustees should in their absolute and uncontrolable discretion think fit. The testator then bequeathed the residue of his property to his two sons and their issue in equal shares, with a limitation over to his granddaughter in the event of both sons dying without issue living to attain twenty-one.

The testator died in May, 1837.

The bill was filed on behalf of the testator's granddaughter, who was an infant, against the executors, for the purpose of having the accounts of the testator's estate taken, the plaintiff's annuity secured to her, and the residue ascertained.

The cause was heard, and the usual decree was made.

In July, 1842, the Master made his general report, from which it appeared that upwards of £180 was due from the executors for arrears of the plaintiff's annuity, the sum of 19*l.* 19*s.* only having been paid by them on that account ; and that no part of the testator's property had been set apart to answer either the annuity or the legacy of £2000.

The cause coming on to be heard for further directions, [*89] *the plaintiff's counsel proposed, not only to have the annuity and legacy properly secured, but to have the arrears of the annuity and the annuity for the time to come paid to the plaintiff's father, by whom she had been maintained and educated since the testator's death. It appeared that the plaintiff's father had sent a letter to the executors requiring them to remit to him the annuity as his own property, upon which the executors refused to allow him any part of it.

Mr. Kenyon Parker and *Mr. Stinton*, for the plaintiff.

Mr. Wigram and *Mr. James Parker*, for the defendants the executors, contended that the father, in requiring the whole an-

1843.—*Stephens v. Lawry*.

nuity to be paid to him, had asked too much ; that, if the testator had intended the father to have the control of the annuity, he would at once have given it to him instead of giving it to the trustees for the benefit of the plaintiff. Here the trustees had an absolute discretion concerning it ; and, therefore, the plaintiff must take *modo et forma* or not at all. They referred to *Lyons v. Blenkin*(a) and *Macpherson on Infants*, chap. 13.

THE VICE-CHANCELLOR (after directing various inquiries) :— With regard to the plaintiff's annuity, the direction to apply it for her maintenance, education, and benefit is absolute. The trustees' discretion is as to the manner of application—not whether there shall or shall not be any application at all. No part of it, except a very small sum, has been in fact applied. She seems never to have been removed from the guardianship of her father, and it is not suggested that a case exists for so removing her. It appears highly probable that he has become wholly liable for the expense of the maintenance, and, so far as she has been educated, the *education of the child [*90] from the testator's death to this time ; and on that ground he claims the plaintiff's annuity for that period. To this the executors, if they do not oppose it, do not assent. If they had distinctly objected to the continuance of her father's guardianship, or distinctly required any specific mode of education opposed and resisted by him, it may be that, though he had maintained and educated her, he might have been very properly excluded from the annuity for the time past wholly or partially ; but the case has not, I think, gone so far. He may have put his supposed rights higher than he was justified in doing, but, on the other hand, it does not appear to me that the executors either took the proper course, if any were required, for excluding his title or claim, or did in fact all that they might have reasonably been expected to do if they were uneasy as to her position and circumstances, and earnest for her welfare.

On the whole, I think I cannot hear them say, that if her father has properly maintained and educated her from the testator's death he ought not to be allowed the £40 *per annum* for the time that he has so done, and so with regard to the future

(a) *Jac.* 245.

 1843.—*Stephens v. Lawry.*

until further order. If the executors upon inquiry—an inquiry which, in my opinion, they ought to take the trouble of making—shall satisfy themselves and inform me that they are satisfied, or, if I shall by any other means be satisfied, that the father has done his duty to this infant, and properly maintained her and educated her from the grandfather's death, I shall permit him to have the £40 *per annum* for that time, so far as it has not been paid; and in that case I shall let him receive the £40 per annum until further order, he undertaking properly to maintain and educate her, and to abide by such order as this Court may make respecting her care and custody; to communicate quarterly information to one of the executors as to her health, condition, and residence, and the progress of her education, and not to remove her out of the jurisdiction: with liberty to apply. Unless [*91] the executors shall *within a given time inform me to the effect I have mentioned, I must take steps to ascertain for myself that on which I require information.[1]

[1] In general, the father, if of sufficient ability, must maintain and educate his infant children, notwithstanding their having property of their own, over which the father had no control. *Wellesly v. Duke of Beaufort*, 2 Russ. 28. *Thompson v. Griffin*, Cr. & Ph. 317. *Kekewich v. Langston*, 11 Sim. 291. One exception to the rule however is, where provision has been made by a marriage settlement, for the maintenance and education of the children. *Stocken v. Stocken*, 4 Myl. & Cr. 95; S. C. 4 Sim. 152; 2 Myl. & K. 489. But in *Thompson v. Griffin*, ubi supra, Lord Cottenham intimates an opinion that the cases by which a father whose children are entitled under a marriage settlement, was relieved from liability for their maintenance had “been carried quite as far as can be justified under principle.” Another exception seems to be made where a testator by will, creates a trust for the maintenance &c. of his infant grand children the trust is to be applied to that object notwithstanding the ability of the father. *Bateman v. Foster*, 1 Collyer, 118, which clearly recognizes the principle to be deduced from the case in the text, although neither the counsel have, nor has the Vice-Chancellor referred to his own decision on the subject. But see the language of Lord Cottenham in a case already cited, (Cr. & Ph. 320) who says; “If the property of the children had been derived from the bounty of a stranger, there could be no doubt, but that the father being of ability to maintain his children, could not be entitled to any allowance out of the income of their property, &c.” In the case in the text, and in *Bateman v. Foster*, ubi supra, the benefit to the children proceeded from their grandfather. Can it be said that it was derived from the bounty of a stranger? There are supposable cases in which this might be made a hinging point. *Thompson v. Griffin*, although earlier in time, (Jan 1841) is not referred to in the case in the text, or in the still later case of *Bateman v. Foster*, decided in Jan. 1844. But it appears that the general rule, applies only to the father, and not to

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MEMORANDUM.

EARLY in Michaelmas Term, 1842, Sir *John Cross*, one of the Judges of the Court of Bankruptcy, died. Soon afterwards, the Rt. Hon. *Thomas Erskine* resigned his office of Chief Judge of the Court of Bankruptcy, and was succeeded by the Rt. Hon. Sir *J. L. Knight Bruce*.

 LESLIE V. BAILLIE.

1843: Jan. 16th.

A testator who died and whose will was proved in England, bequeathed a legacy to a married woman, whose domicile as well as that of her husband, was in Scotland. The husband died a few months after the testator, without having received the legacy. After his decease the executors of the testator, with knowledge of the before-mentioned circumstances of domicile, paid the legacy to the widow. It was proved that according to the Scotch law the payment should have been made to the husband's personal representatives:—*Held*, that in the absence of proof

the mother. So, where a father died intestate, leaving a large real and personal estate, it was held, that the mother was entitled to be allowed out of the portion of the estate belonging to the children, for their maintenance during infancy; and that for time past, as well as for time to come. The right to retrospective allowance was fully sanctioned in the same case. *Wilkes v. Rogers*, 6 Johns. Rep. 566. In the case just cited, p. 593, 4, Spencer J. who delivered the leading opinion in the case, in which there was an unanimous judgment of the Court of Errors of the State of New York, says: "In the present case, the yearly income of the estate of the infants is more than adequate to support them, without breaking in on the principal; and it appears that the income of the mother is not sufficient to support herself and her children in the manner which their fortunes entitle them to be supported and educated. Hence it follows, that to oblige her to maintain and educate her children out of her own estate, would be to destroy the very fund which the law has given her for her own separate use, and to leave that of the children not only untouched, but rapidly accumulating." This case affords the strongest argument for saying that the mother who has only taken out of the fund which the father held for his wife and children, the part allowed by law to her, shall not have that fund burthened with the maintenance and education of her children, who have also received the part allotted by the law to them, and which is abundantly sufficient. It is impossible to lay down any general rules upon this subject, &c." See further *Hamley v. Gilbert*, Jac 354, 9. *Matter of Boswick*, 4 Johns. Ch. Rep. 104. *Thompson v. Brown*, Id. 645. *Allen v. Coster*, 1 Beav. 202.

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that the executors knew the Scotch law on the subject, the payment to the widow was a good payment.

DAVID BAILLIE, formerly of Jamaica, but afterwards of West Mousley in the county of Surrey, by his will dated the 24th March, 1819, after directing payment of his debts and funeral expenses, and bequeathing certain specific and pecuniary legacies, and an annuity of £500 to his wife Phœbe Baillie for her life, gave and bequeathed to each of his brothers and sisters the sum of £500 of his stock in the consols; which several legacies he directed to be transferred and paid within six calendar months after his decease. And for providing a further fund for answering the annuity and legacies thereinbefore given, and for payment of his debts and funeral expenses, he directed his executors in England to sell his estates in Great Britain, and his executors in Jamaica to sell his estates in that island; and he directed that his executors in England should stand possessed [*92] of the proceeds arising from the sales of such estates, upon trust, in the first place, to pay and discharge his debts and funeral expenses, and in the next place to invest a sum in the public funds of Great Britain sufficient to satisfy the annuity given to his wife, and then to pay and discharge the legacies given by his will. And as to the residue of all such trust-monies which should remain after answering the purposes aforesaid, and also as to the stocks or funds which should be appropriated as the security for the aforesaid annuity to his wife, after the determination of said annuity; and also as to the other or part parts of said trust-monies which might become lapsed or be remaining undisposed of, his will was, that his said trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, should stand possessed of the same and of all other his estate of whatsoever nature or description the same might be, in trust for his son Jasper Farmer Baillie, his daughter Louisa Baillie, and such of his brothers and sisters as should be living at the time of his decease, equally to be divided amongst them, share and share alike, as tenants in common, and not as joint tenants. And the testator, by his will and a codicil thereto, appointed James Walker, John Walker, Jasper Farmer

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Baillie, and Phoebe Baillie to be his executors in England; and three persons, of the name of Smith, Vidal, and Stevenson, to be his executors in Jamaica.

The testator died in December, 1826. He left surviving him his wife and the two children named in his will; three brothers, namely, Alexander, Charles, and Thomas; and one sister, Mary, the wife of James Leslie. The will was proved in England by Jasper Farmer Baillie and Phoebe Baillie, and in Jamaica by Stevenson, who, as the bill alleged, duly accounted to the testator's representatives in England. None of the other executors ever proved or acted in the trusts of the will.

James Leslie and Mary his wife were born and married and were domiciled during their whole lives in Scotland. [*93] On the 31st January, 1827, which was a few days only after probate of the will in England, James Leslie died intestate. In the latter part of the same year, the executors in England paid to Mrs. Leslie her legacy of £500 consols, and also her share of the testator's residuary estate, except her reversionary share in the stock out of which the annuity to the testator's widow was payable. As to the property so paid over to her, Mrs. Leslie executed a release to the executors. She afterwards assigned her reversionary interest to T. S. Carter. She died in November, 1830, intestate.

In November, 1832, letters of administration of the personal estate of James Leslie, were granted by the Prerogative Court to the plaintiff, who was the son of Mr. and Mrs. Leslie. Letters of administration were likewise granted to him of the personal estate of Mrs. Leslie.

In March, 1837, the plaintiff filed his bill against the acting executors and children of the testator David Baillie, the personal representatives of Alexander and Thomas Baillie, and Carter the assignee of Mrs. Leslie, praying that the will of the testator might be established and his estates administered, and that the plaintiff as the personal representative of James Leslie might be declared entitled to the legacy of £500 consols, bequeathed to Mrs. Leslie, and to one-sixth of the residuary estate of the testator, and that the same might be paid to him; and, further, that the assignment to Carter might be declared void against the plain-

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tiff. The bill also prayed in the alternative that the plaintiff might be declared entitled to these interests, either under a certain deed of sequestration dated the 16th July, 1832, which was executed under the bankruptcy of Mrs. Leslie, and under which the plaintiff claimed the surplus of her effects, or otherwise as her personal representative.

The bill charged and the plaintiff entered into evidence to show, that by the law of Scotland whatever personal estate accrues to or vests in the wife by way of gift, bequest or [*94] *otherwise during the marriage, is instantly transferred to the husband and becomes his absolute property, and that in case of the death of the husband before the wife, and before such personal estate is reduced into possession, the same does not survive to the wife, but is transmitted and belongs to the personal estate of the husband.

It appeared from the plaintiff's bill that he had been in partnership with his mother, and that they had become bankrupt. It appeared also from the evidence read on the part of the defendant, that the plaintiff knew of the payments made by the executors to Mrs. Leslie, and that part of the sums so paid was applied in discharge not only of the partnership debts, but of the plaintiff's private debts.

It was admitted that the defendants, the executors, at the time they handed over the money to Mrs. Leslie, were aware of the domicile of herself and her late husband, but there was no evidence to show that they knew the legal effect of marriage in Scotland in relation to the wife's property, or even that they knew that James Leslie had survived their testator.

Mr. *Twiss* and Mr. *Anderson*, for the plaintiff.—By the Scotch law, all the property of the wife, whether it consists of *choses en action* or otherwise, belongs to the husband, and on his death descends to his personal representative. The domicile of James Leslie, the intestate, being in Scotland, the property in question devolved upon his death to his personal representative, which the plaintiff now is. The circumstance that the property was in this country can make no difference; because distribution takes place according to the law of the country where the intestate

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dies domiciled: *Pipon v. Pipon*,^(a) *Tyorne v. Watkins*,^(b) *Campbell v. French*; ^(c) and the Courts of this country will give *effect to that principle where it occurs to them [*95] to do so; *Sawer v. Shute*,^(d) *Dues v. Smith*,^(e) *Anstruther v. Adair*,^(f) and the cases there cited, *Lashley v. Hog*.^(g) Whoever therefore by the foreign law is the person to receive the property, is the person to whom this Court will transfer it. The question then is, whether these executors were justified in paying the money in question to Mary Leslie. It is clear that the executors knew that Leslie and his wife were married people and domiciled in Scotland. If therefore they did not actually know that the marriage was an assignment of the wife's property to the husband, they had sufficient notice to put them on further inquiry. In *Selkirk v. Davies*,^(h) Lord Eldon draws a parallel between an assignment on bankruptcy and an assignment on marriage, both of which he considers take effect without intimation to the debtor. *Egerton v. Forbes*.⁽ⁱ⁾

Mr. *Wigram* and Mr. *James Parker*, for the defendants, the executors, were not called upon to address the Court.

Mr. *Russell* and Mr. *Oliver*, for the defendant Carter.

THE VICE-CHANCELLOR.—This is the case of a will and codicil made in the English form, in England, by a testator domiciled in England. The executors are English, and proved the will and codicil in England. The will gives certain legacies, and disposes of all the real estate, so as to create a trust for sale, and directs the proceeds to be distributed as residuary personal estate, thus converting the whole of the testator's property into personalty. One of the residuary legatees was a married lady of the name of Leslie, whose husband survived the testator between three and four months, and dying, left her his widow. If the case *therefore depended merely on the Eng- [*96]

(a) Ambl. 25; App. (D.) Blunt's ed.

(b) 2 Vez. sen. 35.

(c) 3 Vez. 321.

(d) 1 Anstr. 63.

(e) Jac. 544.

(f) 2 M. & K. 513.

(g) Rob. Pers. Succ. 414.

(h) 2 Dow, 248, 249.

(i) Fac. Coll. 27th Nov. 1812.

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lish rules of law and English jurisprudence, and if there were nothing more in the case than the question of the right of the widow to receive the legacy and give a discharge for all that the will gave her, then it would be clear.[1] When the time arrived for the distribution of the estate, the widow on her *prima facie* right applied to the executors and trustees for payment; and according to the *prima facie* line of their duty, and the ordinary practice, and according to every thing that they could learn of the law of England, they made the payment to her, having every reason to believe that she was entitled to receive the payment so made.

It is now said, that, as in truth she was a domiciled Scotchwoman, the wife of a domiciled Scotchman at the time when the will and codicil were made and when the testator died, by the law of Scotland all her property of a personal nature vested in her husband absolutely, without any such distinction as exists in the law of England with regard to what are termed *choses en action* and property of that description; and that he acquired an absolute and indefeasible title to that property against her, whether surviving or not surviving him, so as in effect to make it, upon his decease before her, the property of his representatives as against her. I assume that to be the law of Scotland for the purposes of the present dispute. It is said that, the wife having thus no right to receive the money from the executors, the executors knowing her Scotch domicile, the fact of her marriage, the Scotch domicile of her husband, and that the husband survived the testator, must also be taken to have known the consequences which by the law of Scotland I assume to flow from the marriage of Scotch people. To that deduction, however, I cannot agree. I am of opinion that the executors were not bound to know the law of Scotland on this subject; that they were not bound to know that marriage by the law of Scotland was followed by such consequences: I do not see how the mere [*97] fact of *executors dealing with Scotch people, knowing them to be Scotch people, rendered it incumbent on them

[1] As to the right of the wife by survivorship to her *choses in action* not reduced by the husband into possession, during coverture, see *Corbie v. Free*, Cr. & Ph. 72. *Renwick v. Renwick*, 10 Paige, 424.

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to make inquiry whether the law of Scotland differed from the law of England in the application of rules of right to matters of this description. I am of opinion that it was no part of their duty to do so. If, indeed, the executors had had express notice, which it is not contended that they had, that the law of Scotland differed in this respect from the law of England, and had then paid the money to Mrs. Leslie, they would have been acting in the same way as if, having had notice of an assignment, they still had paid the assignor. There being, however, no notice to the executors at the time of payment, of any claim on the part of the husband's representatives, and no communication on the subject, beyond the mere facts of the domicile and marriage, I am of opinion that the release which was executed, and it seems fairly executed, between the executors and the legatees must have effect given to it. I view this case as if the married lady, at the time of her marriage, had, instead of marrying, made an assignment of the legacy; in which case, if the executors without notice of the assignment had paid her the legacy, the payment would have been good.[2] Treating the fact of the marriage as simply equivalent to an assignment by the wife, mere notice of the marriage was not notice of the assignment, and consequently the payment was good.

His Honor then, after commenting upon the alternative claim made by the plaintiff's bill, decreed as follows:—

TAKE the usual accounts in an administrator's suit, and declare, that, it not appearing that the defendants Jasper Farmer Baillie and Phoebe Baillie, or either of them, when the release of the 1st September, 1827, was executed, or when the payment and transfer therein mentioned, or either of them, were or was made, had notice that, by the law of Scotland, James Leslie, or the representatives of James Leslie, was or were, notwithstanding the fact that Mary Leslie survived James Leslie, beneficially entitled to the funds in question, the Master, in taking the accounts, is to have regard to the said release, and treat the same as binding. Liberty to state special circumstances.

[2] *Reed v. Marble*, 10 Paige, 410.

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[*98]

*LORD V. BUNN.

1843 : Jan. 17th.

A person conveyed certain freehold and leasehold property to trustees, upon trust to pay the rents and profits to his son T. for life, provided that in caso T. should be declared bankrupt, or be discharged under any insolvent act, the trustees should apply the rents and profits in or towards the maintenance, clothing, lodging, and support of the said T. and his then present or any future wife, and his children, or any of them, or otherwise for his, her, their, or any of their use and benefit, in such manner as the trustees should in their discretion think proper. T. was taken in execution for debt, and sent to prison, at the suit of a creditor, who obtained a vesting order against him under the stat. 1 & 2 Vict. c. 110. The insolvent was afterwards discharged under that act :—*Held*, that the life estate of the insolvent was forfeited at the time of his discharge ; that from the date of the vesting order to the time of the discharge, the rents and profits of the estate belonged to the assignee under the act ; that upon the discharge taking place, the discretionary power given to the trustees by the settlement might be exercised by them in favor of the insolvent, his wife and children collectively, or in favor of any of those persons to the exclusion of the others ; and that, to whatever extent the power might be exercised in favor of the insolvent, the benefit which he would take by the appointment would vest in the assignee.

By an indenture of settlement dated the 30th March, 1822, Thomas Lord duly appointed and conveyed a freehold messuage and lands situate in the Edgeware-road to Mathew Norton and David Henderson and their heirs, upon trust for the settlor for his life, with remainder to his wife for her life, and after the decease of the survivor of them upon trust to pay or permit Thomas Lord, the son of the settlor, to receive the clear rents and profits of the premises for his life ; provided always that, in case any commission of bankrupt should be issued against the said Thomas Lord the son, whereupon he should be found or declared a bankrupt, or in case he should make any composition with his creditors for the payment of his debts, though a commission of bankrupt should not issue, or should make any conveyance of his estate and effects for the benefit of his creditors, or should be discharged under any insolvent or other act or acts of Parliament then already or thereafter to be made or passed for the relief or benefit of insolvent debtors, then and in such case notwithstanding the trusts aforesaid they the said trustees, their heirs or assigns, should, during the life of the said Thomas Lord

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the son (subject to the life estates of the said Thomas Lord the settlor and Amelia Elizabeth his wife), stand and be possessed of the said hereditaments and premises upon trust to apply, lay out, and expend the clear surplus rents, issues and profits thereof in and towards the maintenance, clothing, lodging and support of the said Thomas Lord the son, and his then present *or any future wife, and his children, or any of them, or [*99] otherwise for his, her, their or any of their use and benefit, in such manner as they the said trustees, or the survivor, of them, or the heirs or assigns of the survivor, should in their or his discretion think proper; and from and immediately after the decease of the survivor of them the said Thomas Lord the settlor, and Amelia Elizabeth his wife, and Thomas Lord the son, upon trust that they the said trustees, their heirs and assigns, should, during the life of the widow of the said Thomas Lord the son, if he should leave any, pay, apply and dispose of the surplus of the said rents, issues and profits unto such person or persons, and for such intents and purposes as any such widow, notwithstanding any future coverture, should from time to time (but not by way of anticipation) by any writing, as therein mentioned, under her signature appoint; and in default of such appointment, into her own proper hands for her sole and separate use; her receipts to be sufficient discharges: and from and immediately after the decease of the survivor of them, the said Thomas Lord the settlor, and Amelia Elizabeth his wife, and the said Thomas Lord the son, and his widow, if he should leave a widow, upon trust for all and every the children of the said Thomas Lord the son, who being a son or sons should live to attain the age of twenty-one years, or who being a daughter or daughters should live to attain that age or be married, which should first happen, in equal shares and proportions, if more than one, as tenants in common and not as joint tenants, and for their several and respective heirs and assigns for ever; and in case there should be but one such child, then upon trust for such one or only child, his or her heirs and assigns for ever.

By an indenture bearing even date with the preceding indenture, certain leasehold property situate in the New Road was

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duly assigned by Thomas Lord, the settlor, to the same [*100] trustees, their executors, administrators, and assigns, "to hold upon trusts similar to those declared by the before-mentioned indenture, allowing for the difference of tenure of the respective properties.

Thomas Lord the settlor, and Amelia Elizabeth his wife, died many years since, leaving Thomas Lord, the son, surviving them. Thomas Lord, the son, married and had several children.

The original trustees, under the indentures of settlement, having been discharged from their trusts, two persons, named respectively Bunn and Burgoyne, were duly appointed trustees in their room.

Some time after the stat. 1 & 2 Vict. c. 110 came into operation, Thomas Lord, the son, was committed to the Queen's Bench prison, charged in execution for debt, at the suit of one Silver. Satisfaction not having been made for the debt within twenty-one days after such committal, application in pursuance of the above-mentioned act was made by the creditor to the Court for Relief of Insolvent Debtors for the usual vesting order, and such order was accordingly made in July, 1841. Silver was a few months afterwards appointed by the Insolvent Debtors' Court assignee of the estate and effects of the insolvent.

The trustees having, under these circumstances, refused to pay to any person the rents and profits of the property comprised in the indentures of settlement, a bill was filed in January, 1842, by the children of the insolvent, one of whom, a daughter, had attained her age of twenty-one, and the insolvent's wife, the mother of those children, against the trustees, the assignee under the Insolvent Act, (Silver,) and the insolvent, praying that the trusts of the indentures of settlement might be carried into execution, the rights of all parties therein ascertained, and the rents and profits secured.

By an order of the Insolvent Debtors' Court, dated the 19th May, 1842, the insolvent, having duly complied with the provisions of the 75th section of the statute 1 & 2 Vict. c. [*101] *110, was discharged from custody; and the fact of such discharge was brought before this Court by supplemental bill.

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The cause now came on for hearing, the principal question being as to the manner in which the rents and profits of the settled property were to be disposed of during the lifetime of Thomas Lord, the son, from the time of his insolvency.

Mr. *Wigram* and Mr. *Craig*, for the plaintiffs.—We submit that the life estate of the insolvent was determined by the vesting order, or, at all events, by the insolvent's discharge; and that upon the determination of his life-interest a trust arose which might be executed for the benefit of the insolvent, his wife, and children, or any of them, at the discretion of the trustees. If the discretion were exercised to any extent for the benefit of the insolvent, it might be a question whether that benefit would vest in the assignee: *Godden v. Crowhurst*.(a) But the trustees can at their discretion exclude the husband. If they decline to execute their trust, the Court must do so: *Rippon v. Norton*.(b)

Mr. *Selwyn*, for the defendants, the trustees.

Mr. *Russell* and Mr. *Sidebotham*, for the defendant, the assignee.—In the first place, are there any persons in whom this discretion now resides? There seems no ground to contend that the discretion originally vested in the old trustees was transferred to the new trustees by the mere effect of their appointment. Supposing, however, that it was, the words "or any of them," and the subsequent word "their" in the settlement refer to the children only, *and not to the husband, wife, [*102] and children; and, therefore, in any view of the case, the trustees cannot, in the exercise of their discretion, exclude the husband. If he be not excluded, a value can be set upon the interest which he may take under the trust, and the interest so valued goes to the assignee. There is, however, ground for argument, that if these trustees ever had the discretionary power which is contended for, it is gone; first, because it was not executed before the institution of the suit; *Warburton v. Warburton*,(c) *Longmore v. Broom*;(d) and, secondly, by reason of

(a) 10 Sim. 642.

(b) 2 Beav. 63.

(c) 2 Vern. 420.

(d) 7 Ves 127. arg.

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the insolvency. Assuming that prior to the insolvency, the interest of the insolvent was subject to certain discretionary arrangements on the part of the trustees, yet, as their discretion was not exercised prior to the insolvency, his interest, which was vested, cannot now be divested by any act of the trustees: *Green v. Spicer*, (a) *Snowden v. Dales*, (b) [The Vice-Chancellor.—Can it be contended that the power is gone because one of the objects who would take in default of execution of the power is insolvent?] In *Snowden v. Dales*, the insolvent's life interest was held to pass to the assignee, although the effect was to cut out the chance of accumulation for the children out of the savings. *Badham v. Mee*, (c)

THE VICE-CHANCELLOR.—According to my construction of the instruments and the act of Parliament, the right of those who were to take in substitution for the husband's life estate, does not arise till the actual discharge of the husband under the Insolvent Act. The rents of the property, therefore, until such discharge, formed part of the husband's estate, and belong to his assignee.

[*103] *It has been admitted on the part of the assignee, and the admission must be entered by the registrar, that what was required under the act of Parliament to be done to obtain the order of the 19th May, 1842, was done, and that thereupon Thomas Lord obtained his discharge. That being admitted, I am of opinion, that the trust from the time of the discharge took effect in favor of the husband, wife, and children, or some of them.

With regard to the question which has been agitated, whether the discretionary power created by the settlement yet remains in the trustees, I am of opinion that it does. In the first place, I think that, upon the true construction of the whole settlement together, the meaning to be collected is, that a discretion was to be vested in the trustees of the settlements for the time being. It would, I think, be *hæsis in litera* if I were to hold otherwise. Assuming that these trustees were duly appointed in the room

(a) 1 Russ. & M. 395.

(b) 6 Sim. 524.

(c) 1 Myl. & K. 32.

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of the former trustees, I think that the discretionary power created by the settlement is vested in them. It has been suggested, that, as one of the objects who are to take in default of the execution of the power has become an insolvent the discretionary power is gone. I apprehend, however, that the discretionary power has not gone from the trustees. If an individual have a power over an estate, which estate, in default of execution of the power, is vested in others—as, if the person having the power be A., and the persons to take in default of execution be B. and C., it is immaterial in the consideration of A.'s right to execute the power, what may have become of the interest of B. and C., because it is a mere defeasible interest. The assignee can only take such defeasible interest as the bankrupt had. No authority has been stated to me which seems to have proceeded upon a contrary notion, and I think that the trustees have a right under the power to appoint in favor of the insolvent and his wife, or in favor of the *children, or any [*104] of them, with or without the insolvent and his wife, or either of them.

I am also of opinion under these settlements (without saying what might be done under other settlements,) that any benefit which the bankrupt may take will belong to his assignee.[1]

ESTABLISH the indentures and direct the trusts of them to be carried into effect. Take an account of the rents and profits as against the trustees, from the time when they were appointed trustees, making all just allowances. Declare that the assignee is entitled to the rents and profits from the date of the vesting order to the time of the insolvent's discharge; that from the time of his discharge the rents and profits are subject to the trusts of the settlements; and it being admitted that the trustees have been duly appointed, declare that the power is vested in them. Declare that, according to the true construction of these trusts, the trustees have a right to apply

[1] By a marriage settlement property was conveyed in trust to pay the rents, &c. "unto or for the maintenance and support of the husband, wife and children, or otherwise, if the trustees should think proper to permit the same to be received by the husband during his life, without power to charge the same, &c." The husband having become a bankrupt, it was held, that a trust had been created for the maintenance and support of the wife and children out of the property during the husband's life; but that the assignees take every thing subject to what is proper to be allowed for the maintenance of the wife and children. *Page v. Way*, 3 Beav. 20. See *Younghusband v. Gisborne*, 1 Collyer, 400.

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the rents among the insolvent, his wife, and children, or any of them, the insolvent, his wife, and children, exclusive of any other of them. Declare that any right or title of the insolvent under that trust belongs to his assignee. Reserve further directions and costs; with liberty to apply.

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1843: Jan. 18th, 19th; Feb. 11th:

A deed of gift of real estate from an aged and infirm person to his intimate friend and medical attendant, set aside for fraud; one of the circumstances in proof of fraud being that the deed stated, contrary to the truth, a money consideration.

THE bill was filed by George Gibson, as eldest surviving son and heir-at-law of Thomas Gibson, (who died intestate as to the property in question in the cause, leaving a widow and several children surviving him,) praying that certain indentures of lease and release, bearing date 23rd and 24th March, 1840, and purporting to be a conveyance of certain freehold property of the intestate, situate at Leamington Priors, to the defendant, might be declared fraudulent and void, and that the defendant might be decreed to deliver up the same to be cancelled, and might also be decreed to deliver up to the plaintiff possession of the premises, &c.

[*105] *The circumstances of the case will sufficiently appear from the judgment.

Mr. *Russell* and Mr. *Greene*, for the plaintiff.

Mr. *Wigram* and Mr. *Mylne*, for the defendant.

The following cases were cited or referred to in argument:—*Bridgeman v. Green*,^(a) *Dent v. Bennett*,^(b) *Whalley v. Whalley*,^(c) *Filmer v. Gott*,^(d) *Willan v. Willan*,^(e) *Popham v. Brooke*,^(f) *Griffiths v. Robins*,^(g) *Blachford v. Christian*,^(h)

(a) 2 Vez. sen. 627; Wilm. 58.

(b) 7 Sim. 539. [S. C. 4 Myl. & Cr. 269.]

(c) 3 Bligh, 1.

(d) 4 Bro. P. C. 230 (ed. Tonil)

(e) 16 Ves. 72.

(f) 5 Russ. 8.

(g) 3 Madd. 191. (h) 1 Knapp, P. C. 77.

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Drought v. Eustace,(a) *Bowen v. Kirwan*,(b) *De Montmorency v. Devereux*,(c) *Hunter v. Atkins*.(d)

The *Vice-Chancellor* in the course of the argument, referred to *Welles v. Middleton*.(e)

Feb. 11th.—THE VICE-CHANCELLOR.(f)—The object of the bill in this cause, filed by the heir-at-law of Thomas Gibson who died in June, 1840, is to set aside a conveyance made in March, 1840, by indentures of lease and release, dated the 23rd and 24th of that month, of a real estate which belonged to Thomas Gibson, situate at Leamington, in Warwickshire, in favor of the defendant. This estate had not long been acquired by Gibson. It appears to have been conveyed to him in February, 1840. The conveyance in question, that of March, *ex facie* purporting to be upon a sale, is one *of the ordinary description [*106] in such cases; the consideration stated being a sum of £1000, mentioned as paid to Gibson by the defendant, the receipt of which from the defendant is acknowledged upon the indenture of release by Gibson, the apparent vendor, in the usual manner. Had the transaction been real, this sum would probably have been a fair and sufficient price, about equal to the true value of the property. It is however agreed on both sides that neither this, nor any price, was paid or intended to be paid, and that the conveyance so far as it is expressed to be for valuable consideration mis-states the transaction, which the plaintiff contends to have been fraudulent, or at least, equitably invalid, and which was, as the defendant insists, one of pure and free and deliberate gift. It is the defendant's case that Gibson procured from his bankers £1000 in ten bank-notes, delivered the notes to the defendant for the purpose of having them re-delivered by him to Gibson in the form of payment of the alleged consideration-money stated in the deed of release, and accordingly

(a) 1 Moll. 328.

(b) Ll & G. t. Sug. 47.

(c) 1 Dr. & Wal. 119.

(d) 3 Myl. & K. 113. (e) 1 Cox, 112.

(f) The statements which are contained between the brackets in the course of this judgment are drawn up by the reporter, and are necessarily a mere abridgment of the evidence as referred to by the *Vice-Chancellor*.

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on the occasion of its execution received them back from the defendant, and that this was mere color, but a color and a course suggested by Gibson himself, who, as the defendant says, desired that the gift should bear this form.

In March, 1840, when the transaction took place, Gibson was upwards of 80 years old. He had a wife living, to whom, as I collect, he had been married for more than half a century; and by whom he had a numerous family of children. Of these, three only were living in March, 1840: one, the present plaintiff, who has been, as I understand, blind from very early youth, and appears to have been regarded with esteem and some degree of affection, but certainly not with any degree of dislike or disapprobation, by his father; one, a daughter, Sarah, who has never married, and who appears also to have been esteemed and not disliked by her father; and a younger son, William, [*107] who had not *been successful in the world. Each of these persons has passed the middle of life. A son, called Henry Robert, had died before the year 1840, in very narrow circumstances, leaving a widow, and some infant children, without any provision whatever. As to William and Henry Robert, the feelings of their father during the last three or four years of his life seem to have been those rather of disappointment and disapproval, than of satisfaction or affection.

The children of Gibson seem to have had nothing but from him, and one of them at least appears to have been, before and in the year 1840, partially if not wholly dependent on him; the grandchildren wholly so. The amount of his property is not precisely in evidence, but I gather its total value in reality and personalty, in March, 1840, to have been probably between £30,000 and £50,000. Originally in a very humble station, after passing through servitude of various forms, he became a small dealer, then a substantial tradesman, and, ultimately, for his position in life, a considerable capitalist, obtaining, so far as riches are concerned, that success which would be less rare if industrious perseverance and self-denial were more common. Fortunately for himself he had been taken early in life into the service of a gentleman named Russell, now deceased, formerly a

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considerable trader at Birmingham, through whose kindness and patronage he acquired such education as he had, and was enabled to lay the foundation of his fortune. If to this gentleman, to his memory, and to his family, he was capable of feeling, and did feel a grateful and affectionate attachment, that feeling was just and creditable to him.

I have used the expression "such education as he had." It appears to have been sufficient for a person in the position in which he received it. Considered with reference to a fortune of 30,000*l.* and upwards, it was probably limited and defective. At the period which we have particularly to consider, the only regular and constant inmates *with him of his [*108] house were his wife and two female servants. His three surviving children, and the widow of his deceased son, inhabited other houses in the neighborhood. They visited at his house occasionally; some oftener, some more seldom. The daughter slept there latterly, but did not stay there during the day. She had her home with her blind brother, the plaintiff. The father seems to have been a careful, hard, and thrifty man, strong-willed, and not of gentle disposition or very warm affections.

The defendant, younger by full twenty years than Gibson, is the son or one of the sons of his former master and benefactor, Mr. Russell, already mentioned. From this circumstance probably, and probably also from professional eminence, the defendant became the intimate friend and medical attendant of Gibson; intimate friend, that is, as far as their different positions in life would allow, the defendant being in that respect, and in point of education, it must be supposed, the superior considerably of the two. The relation in which they stood to each other may be gathered to some extent, if not quite sufficiently, from the letters of May and June, 1840, which are in evidence, and from those passages of the defendant's answers in the cause. [—The letter of May, 1840, was a letter from Gibson to Russell, in which the former requested the latter to state who in the event of his, Gibson's, becoming unfit to manage his affairs, would have the care of him and his family. The letter of June was the reply of Russell, in which, after adverting to the advanced age of Gibson, and the necessity of his abstain-

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ing, in a great measure, from business, Russell suggested that Gibson's daughter Sarah should attend to domestic concerns, and that his money matters generally should be left to the care of Mr. Cooper, a solicitor. The passages of the answers referred to by the *Vice-Chancellor* and which were read in evidence for the plaintiff, purported to give an account of the original [*109] connection between *Gibson and the defendant. After stating that the defendant's father had in the latter part of his life become unfortunate in business, and that Gibson had from motives of gratitude assisted the defendant, and that an intimacy had thereon arisen between them, in the course of which the defendant had become the medical attendant of Gibson, the first answer proceeded to state, that Gibson, having long previously felt and frequently expressed a desire to make the defendant some substantial present to evince his sense of gratitude and respect for the memory of the defendant's late father, and as a mark of esteem for the defendant, applied to and requested the defendant to accept a gift of a certain freehold house and premises situate at Leamington Priors, in the county of Warwick, (being the property in question in the cause;) and that when the said proposal, which was the spontaneous and unprompted proposal and suggestion of Thomas Gibson himself, was at first made to the defendant, he absolutely declined to accept or entertain the same. That the defendant, however, having afterwards ascertained that Gibson had amply provided for his family, he some time in or about the month of February, 1840, first signified to Gibson his willingness to accept the said intended gift, and the necessary measures were thereupon taken by Gibson and his solicitors for making over to the defendant the said house and property at Leamington agreeably to such declared intention as aforesaid. The *Vice-Chancellor* then read other passages in the answers relating to the same subject. These passages incidentally showed the opinion which the defendant entertained of Gibson's character, whom he stated to have been in many respects generous and liberal, though he admitted that he was "a person of a strong money-getting disposition."———] I may here refer to some parts of the evidence of Mr. Cooper bearing on the same subject. He has been examined in chief on both sides, is mentioned

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with respect in *the defendant's letter of June, 1840, is [*110] one of Gibson's executors, and appears to have possessed his confidence. Both Gibson and the defendant appear to have thought well of him, and the tone and manner in which his evidence is given, as well as the undoubted facts of the case, induce me to consider him a trustworthy witness. I believe what he says. [———The *Vice-Chancellor* then read portions of the evidence of Cooper. This witness stated that for the four years immediately preceding Gibson's death, during which time the deponent was intimately acquainted with him, he learnt that the defendant was the medical attendant of himself and such of his family as lived with him. The defendant was for that period on kind and friendly habits with Gibson, and Gibson always spoke of him with respect and as a friend, and had confidence in him; but the deponent never heard him express a warm interest in his professional success and prosperity, or much personal regard for him.———]

The defendant never informed Cooper, or the wife and children of Gibson, or either of them, or any member of Gibson's family, or of his household, or caused or directed any such person to be informed, in Gibson's lifetime, of the transaction, whether as a gift or as a sale, before or after its completion, or of the existence of any intention of such a kind; nor do the pleadings and evidence, taken together, enable me to feel satisfied that, excluding Gibson and the defendant, and the witness, Westbury, and Mr. Lee, any person who knew or heard of the transaction in question did not know or hear of it in Gibson's lifetime otherwise than as an actual sale for money in the ordinary sense of the term. Westbury, in his evidence, says, that he heard Gibson say to Cooper that Gibson had sold the Leamington property to the defendant. This person, Westbury, was clerk to Gibson, and collected his rents,—in truth, was in his service, though not in what is commonly termed a menial capacity. He was not a member of the legal profession. *Messrs. Sim- [*111] cox and their clerk, Mr. Bower, were professionally concerned, and were the only professional persons concerned, in the transaction. But I am not enabled, on the evidence, to say that Gibson and Westbury, and the defendant, were not the only per-

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sons in Gibson's lifetime apprised of the real nature of the transaction, or informed that a gift of the Leamington property was intended, or had been effected. This observation is subject only to what Mr. Lee says in his evidence, and to what passed between Mr. Thomas Simcox and the defendant on the 28th of February. I do not forget that Mr. Thomas Simcox's retention of that in his memory during the succeeding month might have been thought probable; still I find it upon the materials before me not possible to conclude judicially that Messrs. Simcox and Mr. Bower were not deceived and misled as to the true character of the transaction, (not using the words "deceived and misled" in any sense offensive to Mr. Russell or to Westbury.) [—The *Vice-Chancellor* then read the depositions of Mr. Thomas Simcox, Mr. Bower, and Mr. Lee, the defendant's solicitor; observing, that Mr. Lee, as the defendant's trustee, in the indenture of 24th March, had executed that deed, but at what time did not appear.

The substance of these depositions was as follows:—Simcox deposed, that on the 28th February, 1840, the defendant called upon him at his office, and informed him that Mr. Gibson wished to make him a present of a house at Leamington; upon which the deponent observed, that his late father had always had a great objection to professional men receiving gifts from their clients; that the defendant then said, that his object in asking the question was to ascertain whether Mr. Gibson had the means of providing for his family; to which the deponent replied that he believed he had. The deponent then stated, that on the 18th March, 1840, he received parol instructions from [*112] Westbury, Gibson's clerk, for the preparation of a *conveyance of property at Leamington Priors from Gibson to the defendant for £1000. That the deed was prepared, and the deponent gave his clerk, Bower, instructions to see it executed, and the money paid. The deponent never heard, till after the death of Gibson, that the deed did not state the true consideration.

Bower deposed that he went, by the instructions of Simcox, to see the deed executed: that he found Gibson and the defendant together at Gibson's house; that the deed was executed by Mr. Gibson and the defendant in the deponent's presence; and that

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the consideration money was paid by the defendant to Gibson in bank-notes : that no other person was present in the first instance but that Westbury afterwards entered. No observation was made which led the deponent to think that the transaction was otherwise than an ordinary purchase.

Lee stated, that about March, 1840, he was consulted by the defendant as to a proposal made by Gibson to convey to him certain property at Leamington. That on that occasion the defendant said that he had called on Simcox as the attorney for Gibson, to ascertain whether Gibson could with propriety carry into effect his intention, and that Simcox had assured him that he could spare it out of his income. That the deponent thereupon advised the defendant to accept Gibson's offer. That the defendant did not in any other way employ the deponent professionally in reference to the transaction ; and that Simcox did not at any time apprise the deponent that it was proposed or intended to insert his name as a trustee in a conveyance of the property, or enter into any conversation with him on the subject of such conveyance. That the defendant did not conceal or make any secret of his having received a gift of the property at Leamington from Gibson.—]

On the 18th of June, 1840, Gibson committed suicide, being then, as found by the verdict upon an inquest *held [*113] by the coroner, of unsound mind. The verdict was probably correct. [——The *Vice Chancellor* then read the depositions of the defendant upon his examination at the inquest, and likewise certain passages from his answer on the same subject. He also, upon the same subject read the evidence of Cooper and Westbury. The general result of the evidence of the last-named witnesses was, that Gibson had been in a very declining state of health from February, 1839, to his death, that in December 1839, he had had a severe attack of erysipelas, and that during that period his memory was much impaired. In Cooper's opinion he was occasionally in a state of superannuation for four years previous to his death. The defendant also admitted, that during a severe bodily illness which took place in January or February, 1839, Gibson was subject to occasional mental wanderings and misconceptions. With respect to the particular cir-

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cumstances which occurred on the day of the execution of the deed, Westbury deposed as follows ;—

On the 23rd March, 1840, Thomas Gibson sent me to his attornies, Messrs. Simcox, to inquire if the conveyance to Mr. Russell was prepared, and if so, at what time they could wait upon him with it to be executed ; and they appointed two o'clock the next day for that purpose. I believe there was a note written by me by the desire of Gibson on the same day, and sent to the defendant to inform him of the appointment, and to request his attendance. On the next morning Thomas Gibson reached out his cheque book and gave it to me, desiring me to fill up a cheque for £1000 on the Birmingham Banking Company, payable to himself or bearer ; which is now produced to me, &c. I filled up the cheque, and Thomas Gibson signed it. He then directed me to get a car, that he might go with me to the bank, and he went with me to the bank, and remained at the door of the bank, in the car, while I went in for the money. I [*114] *presented the cheque and got £1000 in ten £100 bank notes. I returned to said Thomas Gibson, and when I got into the car I gave him the notes. We then returned home. When we got into the house he took out the notes and counted them, and put them into his pocket again. He then sat down for a few minutes, and said, "I shall forget what to do with these notes now." I then wrote him a memorandum, by his own direction, the purport of which was, to the best of my recollection, as follows :—"T. G. to hand these notes to Mr. Russell as soon as he comes in, and before the arrival of Mr. Simcox." I delivered this memorandum to said Thomas Gibson, who put it out of sight. A little before two o'clock, the time appointed for the meeting, the defendant came. This note or memorandum then lay on the table. I left the room to look after Mr. Simcox. It was about three o'clock when Mr. Bower (Messrs. Simcox's clerk) came. He and I went into the room together, where the defendant and Thomas Gibson were. Bower then produced the deeds. I believe the conveyance was then read over by Mr. Bower, and signed by Thomas Gibson, and the money paid by the defendant to said Thomas Gibson, in the notes which I have every reason to believe I had so fetched from the bank as before

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stated. The deed which the said Thomas Gibson signed was also signed by the defendant and attested by Mr. Bower. Mr. Bower counted the notes : there were ten £100 Bank of England notes. After counting them he returned them to Gibson, who put them into his pocket. Mr. Bower then tied up the deeds and laid them on the table. Thomas Gibson then reached out two bottles of wine and some cakes, and the defendant, Mr. Bower, and myself, partook of them, and I think said Thomas Gibson had a glass. We sat about a quarter of an hour, and then Mr. Bower left. After Mr. Bower left, Gibson walked about the room and seemed rather confused. He put his hands into his breeches pocket, pulled out the "notes, and offered them to the defendant. I said, "No, Sir, you must keep those notes yourself;" and the defendant put his hand upon said Gibson's shoulder, in a familiar manner, and said, "No, my good friend, those are yours, put them up safely;" and he put them into his breeches pocket again. Defendant then laid hold of the deeds, and wished Thomas Gibson good bye, and said, "I suppose I must take these with me?" Gibson said, "Yes;" and the defendant then went away, taking the deeds with him.——]

A case containing the ingredients that I have mentioned, must, as I conceive, upon principle and authority be viewed as a case upon which, without more, the deeds could not be supported; that is, must be deemed *prima facie* liable to be impeached in equity, so as to throw upon the defendant the burthen of proof to sustain them. The whole evidence, however, in the cause (comprising more, considerably, than I have stated) is contended by the defendant to be together sufficient to establish these three propositions:—First, that Gibson, when he executed the deeds, was of sound mind; secondly, that he was at that time, in all material respects, competent to the transaction of such business; thirdly, that he well understood the whole matter, and needed no other advice or assistance respecting it than such as he had.

I have intimated, and I now say, that this case is, in my opinion, such, in its undoubted and unquestioned circumstances, as to render it incumbent on the defendant to establish, by evi-

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dence, the affirmative of these propositions as an essential condition of his success in the cause. With regard to the first proposition, it is clear, and admitted, that in the early part of the year 1839, Gibson's mind was disordered; that, temporarily or otherwise, whether induced by bodily ailments or otherwise, he was then for some time (shorter or longer) under insane delusion. The defendant insists that Gibson had, in or before the autumn of that year, completely recovered his mental health, [*116] and *was throughout the first four months of 1840, of perfectly sound mind. Upon this point, however, after much reflection, I am not satisfied. It may be that during this period he exhibited on all occasions perfect aptitude for his ordinary business. I assume that on numerous subjects there was at this time no observable mark or symptom of unsoundness, and that conversations might, during the whole of the period, have been held with him on topics of business, and very many others, in which no trace of delusion would have been exhibited. But, upon one subject, if not on more, it is, in my opinion, upon the evidence, doubtful, whether symptoms were not shown which ought to lead to the conclusion that he was not, during the first four months of 1840, of sound mind. I refer particularly to the circumstances regarding his wife. I am aware of what the defendant says on the subject. I am aware how slightly, if not defectively, some matters may be argued to be put in issue by the bill. I am aware of the caution with which the testimony of some of the witnesses is to be received; yet, with all these considerations before me, I have been unable to satisfy myself that during the four months just mentioned, Gibson was not continuing under an insane delusion. If he was so, he was then, of course, of unsound mind. Upon this point, I say no more than that I am not free from doubt concerning it.

The defendant's next proposition is, that Gibson when he executed the deeds was, in all material respects, competent to the transaction of such business. Assuming him to have been then of sound mind, yet neither upon this point am I satisfied that the defendant is right. Having regard to the entire evidence of Westbury, to the differing accounts, especially, which he and the defendant give of some passages, at which they were both

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present, and particularly to the manner in which they speak respectively of the memorandum that was in the room with Gibson on the 24th of March, I find myself left in doubt as to the *state and course of the matters which took place in that [*117] room on that day. Bower, whose respectability and integrity are not questioned, on either side, and could not, probably, be with reason questioned, does not seem to have been intimate with Gibson, and may not have had frequent opportunities of observing him. If Westbury's recollection and statements are correct, Gibson's memory was at the time in a strikingly defective state. Some memorandum there was, and the defendant's account of it, though to be read and considered, has not been made evidence. On the whole, I repeat, that the entire evidence in the case considered with or without the answers, but considered without forgetting the caution and reserve with which some parts of it, unfavorable to the defendant, ought to be received, does not enable me to represent myself as satisfied that when Gibson executed the deeds, if he was of sound mind, he was in all material respects competent to the transaction of such business.

Upon that which I have mentioned as the defendant's third proposition, my opinion is, also, that he has not established it; and I here may declare affirmatively my impression, that Gibson, if sane, took up and pursued the notion of the gift in question, and executed the deeds without the advice and protection, which, in his circumstances, he needed and ought to have had.

Comparing the evidence of Mr. Simcox and Mr. Bower with the evidence of Westbury and the statements of the defendant, it appears to me idle to suggest that Gibson had for any substantial, useful, or effective purpose, a solicitor, or any professional or fit adviser in the matter. I say "fit adviser," not in any sense disrespectful to Westbury. His station and position appear to me not to have qualified him for such a duty, if he had attempted the performance of it. He was, in effect, merely the servant, though not a menial servant, of Gibson, and seems to desire to be understood as having considered that all he *had [*118] to do was to obey his master's orders. Neither the plaintiff nor Mr. Cooper, nor in truth any person, was consulted on the subject. Had some disinterested person of discretion, and weight,

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and consideration, whether in or out of the legal profession, been consulted, the amount of the old man's fortune, the proportion between it and the gift, the situation and prospects of his children and of the family of his son Henry, the certainty that the truth of the transaction must come out, the eccentric and doubtful character belonging to a simulated sale, the possibility that before his death his own views or position or the position of the defendant might be materially varied, the suggestion of a will, or of a deed of gift with a power of revocation, might have been judiciously, and with effect, brought under his attention.[1] I think that all the considerations properly belonging to the matter were not brought before him, if he was capable of understanding or attending to them. Assuming that he himself suggested an apparent sale, how came he to do so? Effectual concealment of the gift could not rationally have been hoped. Enquiries and investigation must, in reason, have been expected to take place sooner or later. Was it in view to exhibit in this way to the defendant, or otherwise, that the gift to him was in effect of £1000? This notion would seem improbable, and almost, if not quite, childish. Did the old man imagine that a deed of gift could not be made irrevocable, and therefore prefer a pretended sale? This also is an improbable theory, and I see no grounds on which to form it. Or, lastly, did it, whether erroneously or otherwise, occur to the mind of some person that though a donor may generally sell or mortgage as against his own voluntary conveyance, where the donee has not dealt with the subject for value: yet it may be difficult or impossible to do so, where the deed of gift is really in form and appearance one of sale? I do not suppose that this occurred to the understanding of Gibson.

[*119] "I confess myself at a loss to account, in any manner favorable to the validity of the transaction, for the form which, whether upon Gibson's suggestion or otherwise, it was made to bear.

As a gift of such value, assuming Gibson to have felt gratefully and affectionately towards the defendant's late father, and

[1] In *Consett v. Bell*, 1 Yo. & Coll. C. C. 578. Vice Chancellor Knight Bruce expresses himself still more strongly as to the weight to be given to the absence, in cases of this description, of advice, or of an adviser.

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kindly towards the defendant himself—assuming that an intention to make him a present had been occasionally mentioned by Gibson, and recollecting what appears in the case as to the assistance that he had rendered the defendant in his early life—I am unable to consider it as one likely to have been made by a man of Gibson's hard, and close, and thrifty disposition, in the vigour of his intellect.

The dates of his will and codicils appear to the 16th November, 1826, 20th July, 1838, and 19th January, 1839. To two of them Mr. John Simcox, to two of them Mr. Bower, and to one of them the late or the present Mr. Thomas Simcox, is an attesting witness. Neither of these three instruments contains, as I understand, any gift or provision except in favor of the testator's wife, children, and descendants. Though, with reference to the gift of £1000 to the charity, it may be a slight or unfounded remark to compare its date with that of the composition of the somewhat remarkable memoir of his life (a production not sparing in his praise,) yet it is difficult to avoid remembering how near this gift was in time to a period when he was certainly disordered in mind, or how the defendant states himself to have considered it at the time, for observing, that, had Gibson been of a free, open, and generous turn of mind, such gifts as these were very large for a man of his fortune, and were, in the state of his family, such as mankind in general would not have deemed prudent.

These being my views of this matter, taken upon reflection, without relying on all the evidence unfavourable to the defendant's case (some portions of which seem to me *to [*120] be of very questionable weight,) I find it impossible to say that these deeds can stand. I think that they must fail on principles perfectly familiar in this Court, and which it has long both in theory and in practice recognized. During the argument I referred to *Welles v. Middletown*, and I may now repeat, that, though the particular circumstances were there specifically very different from the facts before me, the judgment of Lord *Thurlow* contains observations far from inapplicable to some parts of the present case.

The bill is not without inaccuracies. It contains some state-

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ments which are unnecessarily harsh, and bear against the defendant to an extent that the evidence in the cause does not, in my judgment, support. I desire particularly to be understood as not adopting or going along with all that the bill contains—a remark which I make without meaning directly or indirectly any censure upon the learned counsel who has signed it.

There having been no objection on the plaintiff's part to the reception of the evidence in favor of the defendant's reputation, and the respect and esteem in which he is held by his friends and society, I listened readily and attentively to it—evidence certainly by which he has reason to be much gratified. But, of course, I could not allow it to have any weight with me judicially.

I may, however, be permitted to say, that, having heard that evidence, it is highly satisfactory to me to find myself able on judicial grounds to mark my sense of the result of comparing the bill with the evidence by relieving him from a portion of the suit. The point of division is, in my judgment, the time of filing the replication. By that time the defendant, who may not originally have much considered, or may not have distinctly recollected the circumstances of the case, had had his attention called closely and particularly to them, and had had opportunities of taking the best advice. By that time a proposal might [*121] have been made, which, without *wounding any proper feelings, or affecting him prejudicially in the minds of persons capable of forming a sound opinion as to the matter, would either have then terminated the litigation, or very possibly have enabled the Court to deal with the subsequent costs, in a manner different from that in which it now appears to me right to dispose of them. Upon the whole case the decree of the Court is, to declare that the deeds of March, 1840, cannot stand, and to set them aside with the usual consequential directions; to give no costs up to the replication on either side, and to direct the costs after the replication to the present time to be paid by the defendant; reserving subsequent costs, with liberty to apply[.2]

[2] In *Dent v. Bennett*, 4 Myl. & Cr. 269, an agreement obtained by a surgeon from a deceased patient was set aside, upon the ground that the court was satisfied

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1843 : Jan. 24th.

A testator made two wills, one of his English, the other of his American property.

Neither of the wills referred to the other. His daughter, who was entitled to personal property under both wills, executed, previously to her marriage, a settlement of various descriptions of personal property, including specifically her property under the English will, but not mentioning or referring to her property under the American will. The settlement contained a clause providing that such further personal estate (if any) as should during her life become vested in or accrue to or be assignable by her and her husband, should be assigned upon the trusts of the settlement ;—*Held*, that this clause did not affect her American property.

JOHN HORNBY, by his will dated the 27th February, 1802, amongst other devises and bequests therein contained, bequeath-

that the patient never did agree to nor intend what in the alleged agreement he was represented as agreeing to and directing, and that his signature, if genuine, must have been obtained by fraud, or under such circumstances as rendered it the duty of a court of equity to protect the patient and his estate from being prejudiced by it. And this relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another. S. C. 7 Sim. 539, referred to 2 Kent's Comm. 483, n. a. Where the learned commentator, who could not have been aware of the subsequent decision of the Lord Chancellor in the same case, approving and enforcing the same principles, applauds the spirit and energy with which "the Vice-Chancellor enforced the doctrine, that wherever we find the relation of employer and agent in situations in which, of necessity, much confidence must be placed by the employer in the agent, then the case arises for watchfulness on the part of the court that the confidence shall not be abused." The following is a still later case on the subject ; and the editor owes no apology for the introduction of some long extracts from the opinion of the distinguished Judge by whom it was decided.—In 1836, J. H. effected two policies of insurance upon his own life, and by indenture of March 15, 1836, he assigned the same to the plaintiff then a practising physician, and of whom J. H. was the patient at the time. The deed recited that J. H. stood indebted to the plaintiff in the sum of £20 for professional services rendered to J. H. by the plaintiff, which he was unable to pay, and the consideration for the assignment was expressed to be "the said sum of \$20 so due &c. and also the further sum of 10s." In 1837, J. H. died, and his widow who thereupon become his personal representative, having declined to concur with the plaintiff in giving the Assurance Company the necessary receipt, he filed a bill against her, therein stating the deed to have been in consideration of £20, paid in cash ; and the defendant by her answer denied that the consideration expressed in the deed of assignment was ever in point of fact paid, (the answer evidently alluding to the assignment alleged in the bill,) and insisted on the invalidity of the assignment. To support the payment of the consideration stated in the deed, the plaintiff offered evidence

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ed 25,000*l.* to trustees, upon trust to invest the same in the funds, and pay the dividends to the testator's wife, Jane Hornby, for

to prove that £11 was in fact paid at the time of the execution of the deed, and that the residue of £9 was due for past services as a physician: but the court rejected the evidence, and dismissed the bill with costs. Sugden, Lord Ch. "It is said that there is nothing in the relation of physician and patient which can prevent the one from entering into a contract with the other. I mean to lay down no general rule that there is; but while such a relation continues, this court is called upon to look at a contract entered into, without the intervention of a third party, with considerable jealousy. I do not wish to be understood to say, that a man who happens to be an eminent physician, and is therefore called upon to attend a number of persons, is, consequently precluded from entering into a contract, such as the purchase of a house for instance, from any of his numerous patients. In such a case the contract proceeds openly and fairly, and the relation of physician and patient has in reality no bearing upon it. But that is not the case here, for the relation was continued down to the time of the contract, and the contract in point of fact arose out of it. The plaintiff had for several years attended this poor man, and money due to him for medical services was the alleged consideration for the assignment. The relation of physician and patient does not properly arise because the physician may not happen to be in actual attendance at the time &c." "It is said that the mere relation of patient and physician is not sufficient to invalidate a transaction between them. I do not mean to say that it is; but I would set aside such a deed as this between any parties, whatever might be the relation in which they stood to each other. The deed itself shows that the transaction was an improper one. In any case which may come before me, as long as I sit in this Court, in which one party may exercise an influence over the other, whether the relation be that of guardian and ward, solicitor and client, trustee and *cestui que trust*, doctor and patient, or the like, whenever there is a dealing between two parties, one of whom is subject to the influence of the other, I shall expect to find a fair and correct statement of the transaction upon the face of the deed itself; and if such parties mean to uphold their dealings in this court, they must state the nature of them fully and fairly upon the face of the deeds themselves. In this case it is admitted that the statement upon the face of the deed is not true. Upon that ground alone I should be prepared to act: and if this plaintiff procured this man to execute this assignment to him in consideration of £20 in the deed alleged to be due, when, in reality, there was only £9 due, he committed a fraud upon him. I am of opinion that a consideration composed partly of the consideration stated in the deed, and partly of something else, is not consistent with the consideration stated upon the face of the deed, and that it is not open to the plaintiff to give such evidence in order to sustain the deed. I cannot lose sight of the principles of public policy which have been alluded to; yet I decide this case independently of them." *Ahearne v. Hogan*, (Jan. 1844,) Drury, 310, 22, 26. That undue influence is a ground for setting aside a transaction, see *Consett v. Bell*, 1 *Yo. & Coll.* 578, n. (1); *Whelan v. Whelan*, 3 *Cowen*, 537, where the undue influence was exercised by a favourite son, over a father in discussion with other branches of his family. The general principle is elucidated and enforced; but as it

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her life, or until her second marriage; and upon her decease or second marriage, to divide the capital amongst his children; the shares of the sons to be vested at the age of twenty-one, and those of the daughters at twenty-one or marriage; with benefit of survivorship as to the shares of sons dying under that age, or daughters dying under that age unmarried. And the testator gave and bequeathed all the rest and residue of his personal estate, after payment of his just debts and funeral expenses, to his eldest son William Hornby absolutely, and appointed his sons William and John Hunter Hornby his executors.

*This will did not relate to any property of the testa- [*122]
tor other than property in England.

The same testator being seised and possessed of considerable real and personal estate in the United States of America, by a will or testamentary writing duly executed according to the laws of that country, dated the 22nd March, 1831, gave, devised, and bequeathed, all his property both real and personal, and of what nature or kind soever, in the United States of America, unto his sons William Hornby and John Hunter Hornby. their heirs, executors and administrators, upon trust that they and the survivor of them, and the heirs, executors, and administrators of such survivor, or other the acting trustee or trustees for the time being

was not a case arising from the abuse of influence acquired by a professional adviser, it seems unnecessary to give any statement of the facts or of the judgment. The objection of mental imbecility was raised, but there were enough other pregnant circumstances in the case to sustain the bill, which was filed by the grantor himself, who was the subject of the fraud, or undue influence. Age and bodily infirmity, or mental imbecility, merely without other attending circumstances, are not sufficient to invalidate an act. 2 Kent's Comm. 452; 1 Story's Eq. § 238. *Farnam v. Brooks*, 19 Pick 212, where Parker Ch. J. delivering the opinion of the court (p. 220,) says: "We understand the law to be, that no degree of mental or physical imbecility, which leaves the party legal competency to act, is of itself sufficient to avoid a contract or settlement with him; but if advantage is taken of his weakness to draw from him a contract or settlement which is unfavorable, by misrepresentation, imposition or undue influence, such contract or settlement cannot be upheld in a court of equity." So, *McCoun, V. C.* says: "A man may exhibit weakness and folly in entering into a contract, and in disposing of his property:—He may bind himself perfectly (where fraud is not practised upon him,) although he be a man without great abilities, if he have sufficient ability to keep himself above the reach of a commission of lunacy." *Siemon v. Wilson*, 3 Edw. Ch. Rep. 39.

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of that his will, should hold and possess the same, upon trust, and that they should, as soon as conveniently might be after his decease, sell and absolutely dispose of the said property or such part or parts thereof as should not consist of money, and pay over the net proceeds of his real estate that should remain unsold at the time of his death, to and amongst all his sons, as therein mentioned, and the net proceeds of the personal estate consisting of bonds and mortgages and contracts or agreements for lands, notes, or other articles of personal property, to and among all his sons and daughters that should survive him, with the exception of his daughter Ann Hornby, for whom he had otherwise provided, equally to be divided between and among them; the shares of the sons to become a vested interest upon their respectively attaining twenty-one, and those of the daughters upon their respectively attaining twenty-one or marrying.

This will applied only to the testator's property in America.

The testator died in 1832, leaving his widow surviving him, and also fourteen children, all of whom, except Ann attained the age of twenty-one years.

[*123] *The English will was duly proved in England

By the proceedings in a cause of "*Law v. Hunter*" and other suits, a sum of 38,333*l.* 6*s.* 8*d.* £3 per cent. Reduced Annuities, was declared to be in substitution for the bequest of £25,000 under the testator's English will.

By an indenture of settlement dated the 1st May, 1834, made on the marriage of Caroline Hornby, one of the testator's children (who had attained twenty-one,) with the plaintiff William Hoare, reciting that Caroline Hornby was absolutely beneficially entitled to the several sums of 8626*l.* 16*s.* 1*d.* £3 per cent. Consols, and 1803*l.* 2*s.* 4*d.* Bank stock, then standing in the names of trustees in trust for her; and reciting the will of Ann Hunter and certain suits consequent thereon, under which Caroline Hornby took a reversionary interest in the several sums of 10,757*l.* 2*s.* 11*d.* Bank stock, 21,432*l.* 17*s.* 2*d.* £3 per cent. Consols, and 3069*l.* 11*s.* 7*d.* £3 10*s.* per cent. Annuities which were then in Court, to the credit of those causes; and reciting the English will of John Hornby, and that Caroline was entitled to a reversionary interest in one-thirteenth share of the before-mentioned

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sum of 38,333*l.* 6*s.* 8*d.* stock expectant upon the life interest of her mother therein ; and further reciting that upon the treaty regarding the settlement or settlements which it might be reasonable and proper to make upon the said intended marriage, it was agreed that the said sums of 8726*l.* 16*s.* 1*d.* £3 per cent. Consolidated Bank Annuities, and 1803*l.* 2*s.* 4*d.* Bank stock, then standing in the names of William Hornby and Robert Carrick Buchanan in trust for the said Caroline Hornby in the books at the Bank of England, should be settled in manner thereafter mentioned, and that she should assign her one-thirteenth part or share, being the vested interest to which she was entitled in reversion as thereinbefore was mentioned, of and in the said sum of 38,333*l.* 6*s.* 8*d.* £3 per cent. Reduced Annuities, and also all such share or shares as should or might thereafter accrue to her of and in the same, *and also all such further part [*124] or share as she the said Caroline Hornby might become entitled to, of and in the said several sums of 10,757*l.* 2*s.* 11*d.* Bank stock, 21,432*l.* 17*s.* 2*d.* Bank £3 per cent. Consolidated Annuities, and 3069*l.* 11*s.* 7*d.* £3 10*s.* per cent. Annuities, then remaining in Court unto the trustees*thereinafter named, upon the trusts thereafter expressed or declared of and concerning the same respectively ; and it was further agreed, that such other personal estate as the said Caroline Hornby should become entitled to, except as thereafter excepted, should be settled in manner thereafter mentioned : It was witnessed, that, in pursuance of the said agreement on the part of the said Caroline Hornby, and in consideration of the said intended marriage, she the said Caroline Hornby, with the privity, consent, and approbation of the plaintiff, bargained, sold, and assigned unto the said William Hornby and Robert Carrick Buchanan, all the said reversionary vested interest of her the said Caroline Hornby, of and in the said one-thirteenth part or share of the said sum of 38,333*l.* 6*s.* 8*d.* £3 per cent. Reduced Annuities, and also all such further and other share or shares, as, by the happening of any contingency or contingencies, should or might survive or accrue to her, and all such dividends or interest as should or might become payable to her in respect of the said original or accruing part or

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share, or parts or shares, from and after the decease of the said Jane Hornby, widow, party thereto, or on her marrying again, and also the reversionary share and interest, shares and interests, as well original as accruing, to which the said Caroline Hornby might become entitled of or in the said sums of 10,757*l.* 2*s.* 11*d.* Bank stock, 21,432*l.* 17*s.* 2*d.* Bank £3 per cent. Consolidated Bank Annuities, and 3069*l.* 11*s.* 7*d.* £3 per cent. Bank Annuities, and all such dividends or interest thereof as she should or might become entitled to in respect of the same Bank stock, £3 per cent. Consols, and £3 10*s.* per cent. Annuities; [*125] to have, hold, receive, and take the said *reversionary parts or shares, and all and singular other the premises thereinbefore assigned unto the said William Hornby and Robert Carrick Buchanan, their executors, administrators, and assigns, upon trust that the trustees or trustee for the time being should receive the dividends of the said sum of 1803*l.* 2*s.* 4*d.* Bank stock as the same should become payable, and should, during the joint lives of the said Caroline Hornby and the plaintiff, pay the same into the proper hands of the said Caroline Hornby, or as she should by writing appoint, free from the debts, disposal or control of the plaintiff, and should pay the dividends of the remainder of the trust funds to the plaintiff for his life; and after his decease should pay the dividends of the whole of the trust funds to Caroline Hornby for her life; and after the decease of the survivor of the said Caroline Hornby and the plaintiff, should stand possessed of the trust funds for the benefit of the children of the marriage, and in default of children for the benefit of the next of kin of Caroline Hornby as therein mentioned.

The indenture then contained the following clause:—"And it is hereby further agreed and declared, that if the said intended marriage shall take effect, all such further or other portion or personal estate (if any) as shall, during the life of the said Caroline Hornby, become vested in or accrue to her, or as shall or may be assignable by them the said William Hoare and Caroline Hornby, or either of them, in law or equity, either for a vested or contingent interest, shall be assigned unto them the said William Hornby and Robert Carrick Buchanan, their ex-

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ecutors, administrators, and assigns, upon such and the same trusts, and for such and the same intents and purposes, and under and subject to the same provisoes, declarations, and agreements as are hereinbefore expressed of and concerning the said sum of 1803*l. 2s. 4d.* Bank stock hereinbefore assigned, or expressed or intended so to be, or the stocks, funds or *se- [*126] curities, which shall or may be substituted for the same, or arise therefrom, or such of the said trusts, intents, purposes, provisoes, declarations, and agreements, as shall be subsisting or capable of taking effect or being performed; but it is nevertheless also agreed and declared, that the proviso lastly hereinbefore contained shall not extend to any specific chattel or bequest, nor to any pecuniary legacy or interest which the said Caroline Hornby may from time to time become entitled to, either in possession or reversion, unless every such legacy or interest at each time amount in value to the sum of £500 sterling.

The marriage was solemnized soon after the date of this indenture, and there were three children of the marriage.

During the time that elapsed between the death of Mr. Hornby in 1832 and the year 1841, his agent in America transmitted to this country considerable sums in respect of Mr. Hornby's personal estate in America, of which the sum of £2700, as Mrs. Hoare's share, was paid over to the trustees of the settlement, and by them invested in their names in the funds. The plaintiff being advised that that fund was not included in the settlement, filed his bill against the trustees of the settlement and against his wife and children, claiming it in his marital right.

Mr. Simpkinson and *Mr. Stinton*, for the plaintiff.

Mr. Spence and *Mr. Sergeant* for the defendants, the trustees.

Mr. Goodeve for the defendans, Mrs. Hoare.

Mr. Chandless for the defendants, the children, contended that the words of the settlement were sufficient to comprise the American property, and he particularly relied on the word "accrue" as being a word of very extensive *significa- [*127]

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tion. He cited *Graffley v. Humpage*,^(a) *James v. Durant*,^(b) and *Blythe v. Granville*.^(c)

The cases of *Bulmer v. Jay*^(d) and *Daniel v. Dudley*^(e) also mentioned.

THE VICE-CHANCELLOR (after stating the facts).—As to the disposition of the American property, the mode of dealing with it was to divide it into small portions, and to sell them to the settlers. The resident agent was continually converting it into personalty from month to month and from week to week. The effect of the American will was to give the property comprised in it, both unconverted, and converted, to the sons and daughters of the testator upon their attaining twenty-one, or the daughters marrying; with the usual clause of survivorship in the case of sons dying under the age of twenty-one, or daughters dying under that age unmarried. Caroline was one of the testator's thirteen children, and, having attained her majority, acquired a vested interest in all sums to be received from time to time from the American property, under the provisions which I have mentioned. She had also other considerable property in the bank of England. She was also entitled in reversion under her father's English will to various descriptions of property in England, expectant upon her mother's life estate. A marriage was agreed upon between herself and Mr. Hoare, the present plaintiff, after she had attained her majority. The marriage settlement, with considerable minuteness and at considerable length, recites the [*128] instruments under which she had acquired her *property, but, though mentioning her father's English will, does not in any manner mention or refer to the Ameican will; nor does the English will refer to the American; therefore in no sense was the American will contained or embodied in the settlement. After going through the description of various sorts of property, the settlement recites an agreement that they should be settled. The recital ends thus: "it is further agreed, that such other personal estate as the said Caroline Hornby shall become

(a) 1 Beav. 46.

(b) 2 Beav. 177.

(c) 6 Jur. 961.

(d) 4 Sim. 48. 3 M. & K. 197.

(e) 1 Phillips, 1.

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entitled to, shall be settled as hereinafter mentioned." Now, in my view of the correct construction of the language here used, the right to the unreceived American fund was that to which she *had* become entitled, and not one to which she *would* become entitled. The words "shall become entitled" cannot, I think, be referred to property which had already devolved to her. Still I agree that if the intention required it, these words might receive a construction different from what is usually applied to them.[1] Before, however, the Court departs from what

[1] The rule of construction stated in the text, has frequently been recognized. In accordance with this principle it has been held that covenants are to be construed according to the obvious intention of the parties, as collected from the whole context of the instrument containing them, and according to the reasonable sense of the words; and, in conformity with this rule, a covenant in large and general terms, has frequently been narrowed and restrained where there has appeared something to connect it with a restrictive covenant, or where there are words in the covenant itself amounting to a qualification; and that covenants are to be construed as independent, or restrictive of each other according to the apparent intention of the parties, upon an attentive consideration of the whole deed, see *Iggulden v. Mey*, 7 East, R. 241. *Cage v. Paxton*, 1 Leon. R. 116. *Gale v. Reed*, 6, East R. 69. *Sicklemore v. Thistleton*, 6 M. & S. 9. *Smith v. Compton*, 3 B. & Ad. 30. *Smith's Com.* 648. It is a general maxim in the interpretation of deeds, that general words are to be restrained according to the subject matter, or persons to which they refer. In construing the words, it is proper to consider, first, what is there meaning in the largest sense, which, according to the usage of language, belongs to them, and if it should appear that that sense is larger than the sense in which they must be understood in the deed in question; then, secondly, what is the object for which they are used; on the one hand they ought not to be extended beyond their ordinary sense in order to comprehend a case within their object, for that would be to give effect to an intention not expressed; on the other hand, they ought not to be so restricted as to exclude what is within their object and their ordinary sense, for that would violate the rule which requires that effect should be given to such intention of the parties as they have used fit words to express. *Borradale v. Hunter*, 5 Scott N. R. 431, 432. *Moseley v. Motteux*, 10 M. & W. 533. *Smith's Com.* on Statute and Constitutional Law, 654. Covenants are to be construed according to their spirit and intent; and where, from the subject matter of the covenant, it is the evident intent of the parties, that they should be taken distributively, they may be so taken, although there be no express words. *Ludlow v. McCrea*, 1 Wend. R. 228. *Ernst v. Bartle*, 1 John. Cas. 319. As to the rules of construction of deeds and covenants according to intent of parties, see *Marvin v. Stone*, 2 Cow. R. 781. *Quackenboss v. Lansing*, 6 John. R. 49. *Roberts v. Roberts*, 22 Wend. R. 140. *Emery v. Hitchcock*, 12 Wend. R. 156. *Tooley v. Dibble*, 2 Hill's N. Y. R. 641. *Jackson ex dem. Bulkley v. Delacroix*, 2 Wend. R. 433. *Jackson v. Moncrief*, 5

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is ordinarily the correct interpretation, it must be satisfied that the intention of the parties does require it.[2] But in this case, not only the intention does not imperatively require it, but the probability of intention seems the other way. Judging from the materials which I have before me, and from them alone, it is probable that if the American property was to have been settled, it would have been expressly mentioned, and, being of an assignable nature, would have been assigned. On the contrary no part of that property is assigned. Though in form, and according to custom and habit, assignable, it is left to be operated upon by the covenant to which reference has been made. That covenant is found in these words: —“ And it is hereby further agreed and declared. that if the said marriage shall take effect, all such further or other portion or personal estate, *if any* [*129] as shall during the “life of the said Caroline Hornby become vested,” &c. The words “if any” import an uncertainty in the minds of those who prepared the settlement whether there would be any property of the description there mentioned. The word “shall” imports futurity, and this is followed by the words “during the life of the said Caroline Hornby become vested.” But this property (according to the ordinary use of words) *was* vested. It was not meant to express by the word “vested” that the person should have the actual possession of the property: the word is used in its ordinary sense. But here the property was vested in right; it could not therefore *become* vested. The word

Wend. R. 26. *Arundell v. Arundell*, 1 My. & Keen, 316. *Howard v. Rogers*, 4 Har. & John. 278. *West v. Biscoe*, 6 Har. & John. 460.

[2] The plain and literal meaning of words should never be departed from, unless there be strong evidence that the meaning of those who drew the instrument was different from that which the language imports. *Clark v. People*, 26 Wend. 599. In the case cited this rule was applied in the construction of a statute; it is equally applicable to deeds and other written instruments. It has been justly held, it is the intention of the parties, appearing in the deed, that always governs courts of equity in its construction; not the arbitrary conjecture of the judge, though founded on the highest degree of probability. *Horvey v. Horvey*, 2 Desau. 115, 126. In the case last cited, it was held the court may supply words omitted in a deed, providing for children, to give effect to the intention, if it be clear and approved on the face of the deed. But it would be hazardous to insert words, on conjecture that they were accidentally omitted.

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"accrue" means accrue by a fresh and new title. It would be altogether erroneous to apply that term to the mere manual reception of what was already vested in her. Then follow the words "shall or may be assignable by them." It is true that the property in question was assignable by them; but the words "shall or may," both indicating futurity, (and "may" indicating a contingency also,) show that the parties contemplated only what was to be assignable by them at a future time. It would be erroneous, therefore, and improper, upon the materials before me, if I were to hold that the settlement extended to property then due or coming to Mrs. Hoare, in respect of the American estate. Upon the cases of *Graftey v. Humpage*, *James v. Durant*, and *Blythe v. Granville*, I desire to be understood as neither stating nor intimating any opinion. Those decisions proceeded upon the instruments and facts which were in question in those cases. I decide this case upon a different instrument and different facts.

DECLARE that, according to the true construction of the settlement, the share and interest of Mrs. Hoare under the American will were not affected by the settlement; without prejudice to the question, whether there is or is not any case for reforming the settlement.

 *CAVE V. CORK.

[*130]

1843: Jan. 17th.

Upon the death of the vendor of an estate, certain persons who under an order in a suit in Chancery had been appointed trustees of the vendor's personal estate for the purposes of his will, filed their bill against the representatives of the purchaser, for specific performance of the agreement for sale. After the commencement of the suit, one of the trustees, who was also executor of the vendor, died: —*Held*, that the suit thereby became wholly abated.

A bill for specific performance of a contract for the sale of real estate was brought against the heir of a purchaser, alleging that he in his ancestor's lifetime took upon himself the contract. To this suit the administratrix of the purchaser, who died many years before the filing of the bill, was made a defendant, and upon her death (after alleging by her answer that the intestate's estate had been duly administered) the suit was revived against the grantee of limited letters of administration *&c*

1843.—Cave v. Cork.

bonis non of the effects of the purchaser, the plaintiff not seeking any general administration; *quære*, whether such grantee was a proper and sufficient party to the revived suit, or whether the general personal representative of the purchaser ought to have been made a party.

By an agreement dated the 20th April, 1812, and made between William Beslee, of the one part, and George Brook Cork, of the other part, the former agreed to sell to the latter the fee simple of certain freehold property, of gavelkind tenure, situate at Laybourne, in the county of Kent, for the sum of £700.

At the time of the execution of the agreement, £50 was paid on account of the purchase money, and Cork was let into possession of the premises. The title deeds were left in the hands of his solicitor, but no conveyance was ever made to him.

Some time afterwards, Cork paid £150 on further account of the purchase money; and in June 1820, which was after that payment, his solicitor wrote a letter to Beslee stating that Cork was in bad health and had agreed to transfer the estate to his son William Cork, and proposing that the conveyance should be made to the son, the residue of the purchase money (£500) being secured by way of mortgage of the premises.

In answer to this letter, Beslee, by letter stated that if it would be an accommodation to Mr. Cork, junior, to have £300 left on mortgage, and the interest regularly paid, he should not object to let that sum remain on mortgage to him.

George Brook Cork never made any transfer of the property to his son William Cork, but William Cork subsequently to these letters paid to Beslee various sums on account of [*131] interest on the balance of the *purchase money, and also paid £100 further part of the purchase money.

In January, 1829, Beslee died intestate as to his real property, leaving William Alexander Barr his heir according to the custom of gavelkind, and having by his will appointed John Barr and William Cave his executors, who duly proved the will. John Barr afterwards died; and in a suit of "*Barr v. Cave*," Charles Gaunt and George Turner were appointed, jointly with William Cave, trustees of the personal estate of Beslee for the purposes of his will; and indentures of assignment and re-assignment were executed for vesting in them the trust premises.

1843.—Cave v. Cork.

George Brook Cork died many years ago intestate, leaving William Cork and Thomas Cork his gavelkind heirs; and letters of administration of his personal estate were granted to his widow, Elizabeth Cork.

The bill, which was filed by Cave, Gaunt, and Turner, against William and Thomas Cork, W. A. Barr, and Elizabeth Cork, prayed that William Cork might be decreed to pay to the plaintiff the balance of the purchase money, viz. £400, or that the mortgaged premises might be sold for that purpose, or otherwise foreclosed.

Upon the cause coming on for hearing in Hilary Term 1842, it appeared that the suit had abated by the death of Elizabeth Cork and William Cave. After argument, the Court directed that the cause should stand over, with liberty for the plaintiffs to bring the personal representatives of deceased parties before the Court, or show by amendment that such parties were not necessary.

In consequence of this order the plaintiffs filed a bill of revivor against John Blaker, as grantee of limited letters of administration *de bonis non* of the effects of G. B. Cork, and against the executors of William Cave.

The cause coming on again for hearing,

Mr. Chandless, for the defendant William Cork, *objected that the bill of revivor being brought only [*132] against the representatives of the deceased parties was improperly framed; that, in general, by the death of one of several plaintiffs, there is a total abatement of the suit, unless the interest of the deceased co-plaintiff survives to the others; that here, Cave, though a co-trustee, was also executor, and that his interest in that character did not survive to the other plaintiffs. The bill of revivor, therefore, ought to have been filed not only against his representatives and those of the purchaser but also against all the original defendants. [The Vice-Chancellor referred to *Fallowes v. Williamson*,^(a) and *Merrywethe, v. Mellish*.^(b)]

(a) 11 Ves. 306.

(b) 13 Ves. 161.

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Secondly, the general administrator of the purchaser ought to have been made a party to the revived suit, and not the holders of limited letters of administration. *Clough Dixon.*(a)

Mr. *Cooper* and Mr. *Renshaw*, for the plaintiffs.—If Cave had been tenant in common with the other plaintiffs, the first objection might have been good. But here by means of deeds of assignment and re-assignment, the interest which he had originally became vested in himself jointly with the other plaintiffs, as trustees, and upon his death, survived to the other plaintiffs. Whatever other interest he had is represented by his executors.

The second objection is not tenable, because it is not sought here to administer the estate of G. B. Cork : and in that respect, this case differs from *Clough v. Dixon*. Besides we ask relief against William Cork only, on the ground that he has taken upon himself the contract.

Mr. *Anderdon*, for the defendant Thomas Cork.

THE VICE-CHANCELLOR.—The debt in question, in [133] this *cause, which was due to the executors of the original testator Beslee, became by assignment and re-assignment vested, as far as it could be vested, in three persons as trustees, one of those persons being the surviving executor, and the effect of the assignment being to control the acts of that executor. Under such circumstances, it is impossible to disregard the title of the trustees ; and William Cave sued in the character of trustee as well as executor. The suit, however, would have been defective, if the executor had not been a party, and Cave sustained that character as well as the character of trustee. Upon his death, therefore, the same abatement took place, as if he had been the only executor, and Gaunt and Turner had been the only trustees. I apprehend that the only correct mode of remedying that was to file a bill of revivor or revivor and supplement to which all the original surviving parties, as well as the representatives of those who were dead, should have been parties. The bill of revivor must therefore be amended by

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adding to it the names of William Cork, Thomas Cork, and W. A. Barr.

With respect to the other objection, as the plaintiff waives all relief in the suit, except such as may be enforced against William Cork in consequence of his having, as the plaintiff alleges, taken the original purchase upon himself, it is unnecessary to decide it.[1]

*BROWN V. WOOLER

[*134]

1843: Jan. 28th.

Upon the construction of a will :—*Held*, that a legacy charged upon the testator's real estate, and payable when the youngest child of the testator should attain 21, was vested in the legatee before that period.

CHARLES WOOLER, by his will dated the 11th February, 1817, gave, devised, and bequeathed unto Sarah his wife and his eldest son Charles Wooler, all his mills, drying kilns, malt kilns, with the implements and machinery therein and respectively belonging thereto, and also all his messuages, tenements, lands, hereditaments, and premises, (all of which were of freehold tenure,) with their and every of their appurtenants, situate and being at Ledgard Mill and Foldhead, in Mirfield or elsewhere, in the county of York, upon trust to receive the rents, issues, and profits thereof, and apply the same, or so much thereof as should be necessary, in and towards the maintenance and support of themselves, and the maintenance, education, and support of all his other children, Mary, Sarah, Harriet, Thomas, and Benjamin, until they respectively should attain the age of twenty-one years, in case his said wife should remain his widow and unmarried, and provided the said Charles Wooler, and his, the testator's,

[1] Where a suit abates by the death of one of the original defendants, and a third party subsequently acquires the interest of the deceased party, by purchase from his heirs before the revival of the suit against the heirs, the suit must be revived, by a bill of revivor and supplement, against the purchaser. *Herrington and Wife v. Becker*, 2 Barb. Ch. R. 75. See also *Leggett v. Dubois*, 2 Page, Ch. R. 681 Barb. Ch. Pr. vol. 1, p. 681.

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said wife, and children Mary, Sarah, Harriet, Thomas, and Benjamin, could agree to reside amicably together; but if it should at any time happen that they should not agree to reside together, then he thereby devised and bequeathed unto the said Charles Wooler all those his said mills, hereditaments, and real estates, to hold to him the said Charles Wooler, his heirs and assigns for ever, divested and wholly discharged of and from the trust thereinbefore created, but subject nevertheless unto, and charged and chargeable with, the payment of the several annuities and legacies thereafter given. He gave, devised, and bequeathed unto Sarah his wife, for and during such time as she should continue his widow and unmarried, one clear annuity, rent-charge, or sum of £234 for the maintenance and support [*135] of herself, and the maintenance, education, and support of all his said children, Mary, Sarah, Harriet, Thomas, and Benjamin, during and until the youngest of them should have attained his or her age of twenty-one years; the same annuity to be issuing and payable out of all his said real estates, and to be paid to her his said wife or her assigns during her widowhood as aforesaid, by four equal quarterly portions, &c. Provided always, nevertheless, that in case his said wife should happen to die or marry again before his youngest child should have attained his or her age of twenty-one years, then and in that case the testator ordered and directed that the said Charles Wooler should pay or cause to be paid unto his friends and nephews Samuel Walker and Charles Walker, or to the survivor of them, or the heirs, executors, or administrators of such survivor, (whom he thereby appointed guardians of his said children Mary, Sarah, Harriet, Thomas, and Benjamin, and trustees for that purpose,) the annuity, rent-charge, or sum of £100 of like lawful money, the same to be issuing and payable out of his said real estate, by four equal quarterly payments in every year, the first payment thereof to begin and be made at the end of three calendar months next after the decease or marriage of his said wife, which should first happen: and he directed that the last-mentioned annuity should be paid by the trustees for the time being in or towards the maintenance and support of each of his said children Mary, &c., as should have

1843.—*Brown v. Wooler*.

attained the age of twenty-one years, and in and towards the maintenance, education and support of such of them as should then be under the age of twenty-one years ; and when and so soon as his youngest child should have attained that age, then he directed that the said last-mentioned annuity or rent-charge, or the trust thereof, should cease and determine ; and he thereby subjected, charged, and made liable his said real estate to and with the true payment of such annuity or rent-charge accordingly. And the testator gave and bequeathed unto *his daughters Mary, Sarah, and Harriet the legacy or [136] sum of £300 apiece, and to his sons Thomas and Benjamin the legacy or sum of £400 apiece ; the same to be paid and payable unto them his said sons and daughters, or their respective lawful representatives, within twelve months next after the youngest of them should have attained his or her age of twenty-one years : nevertheless, he willed, ordered, and directed that if the said Charles Wooler should think proper, and find it more convenient to pay unto such of his, the testator's said sons and daughters as should attain his or her age of twenty-one years, his, her, or their respective legacy or legacies, or any part or parts thereof, when and as they his said sons and daughters should respectively attain their ages of twenty-one years, or at any time afterwards, and prior to the time of the youngest of them attaining that age, then and in that case it should be lawful for him so to do at any time or times when most convenient to him. And the testator devised all his real estate, subject to the several payments, trusts, and conditions aforesaid, unto the said Charles Wooler, his heirs and assigns for ever.

The testator died in 1817, leaving his wife and the several children named in his will surviving him. Soon after his decease, Charles Wooler entered into possession of the testator's estates.

In 1822, Sarah, one of the children of the testator, married John Gill. She survived the widow, attained the age of twenty-one, and died on the 26th February, 1828, which was before the youngest of the testator's children attained the age of twenty-

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one ; whereupon letters of administration of her personal estate were granted to her husband John Gill.

By an indenture dated the 29th January, 1833, John Gill assigned the legacy of £300 bequeathed to his late wife, to George Brown, to secure the re-payment to Brown of two sums amounting to £200, which had been previously [*137] lent by him to Gill, with interest thereon. The deed contained a power of attorney authorizing the assignee to recover and give receipts for the legacy.

In March, 1835, Gill was convicted of felony and sentenced to be transported for seven years. In the same year, but in what month did not appear from the pleadings, Benjamin, the youngest child of the testator, attained his age of twenty-one years.

The bill was filed by the executors of George Brown (one of whom, since the conviction of Gill, had procured limited letters of administration *de bonis non* of the effects of Sarah Gill) against Charles Wooler and the Attorney-General praying for an account and payment of what was due to the plaintiffs for principal and interest in respect of their security, and in default of payment thereof by Charles Wooler that the legacy of £300 and interest thereon might be raised by sale of a competent part of the testator's estates, and the plaintiff's demand paid thereout, together with the costs of this suit.

Mr. *Kenyon Parker*, and Mr. *Elmsley*, for the plaintiffs, contended that the legacy given to the testator's daughter, Sarah, was vested although she died before the youngest child attained twenty-one ; the payment of it being obviously postponed for the convenience of the estate and not with reference to the legatee. Jarman on Wills, Vol. 1, p. 756. Besides here the payment was to be made to the legatees "or their respective lawful representatives" within twelve months after the youngest child should have attained the age of twenty-one, which showed that the testator contemplated the possibility of a legatee dying before that period.

Mr. *Purvis* and Mr. *Rasch* for the defendant, Charles Wooler. The postponement of the payment of these legacies is not for the convenience of the estate, but with reference to the cir-

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circumstances of the legatees. They are "not to take until [*138] the youngest attains twenty-one, except in one event, that is, if the eldest son, Charles Wooler, "shall think proper" to pay any of them upon their attaining twenty-one before that period. This he has not done. In this respect the present case is distinguishable from *King v. Withers(a)* and other cases of that class. *Pawlett v. Pawlett.(b)*

Mr. *Wray*, for the Attorney-General.

THE VICE CHANCELLOR.—I quite accede to the distinction which exists as to vesting, between legacies payable at a future time out of real estate, and legacies payable at a future time out of personalty. There is no doubt a general, recognized line of distinction between them. Still the rule on this subject is liable to the operation of a more general and powerful rule, namely, that the intention of the testator, to be gathered from the words of the will, must prevail. It is clear that the testator in this case intended the legacy in question to vest notwithstanding the death of the legatee before the testator's youngest child should attain twenty-one.[1]

(a) Ca. t. Talb. 117.

(b) 2 Vent. 366.

[1] In a case in Ohio, where the will contained the following clause;—"The farm and town property rented to S. L. W. deceased, I will to the three children of S. W. L. provided they live to legal age." It was held that the devisees required a vested right immediately on the death of the testator, subjected to be defeated in the event of their death before they arrived at legal age, where such construction harmonized with the other provisions of the will. *Foster v. Wicks' Lessee*, 17 Ohio R. 250.

Chancellor Walworth in *Birdsall v. Hewlett*, 1 Paige Ch. R. 33, held that it was a general rule, that legacies chargeable upon the real estate and payable at a future day, are not vested; and lapse by the death of the legatee before the time of payment arrives; see also *Moore v. Smith*, 9 Watts R. 403. But that this rule has never been extended to a case, where the estate was given to a stranger, upon condition that he paid the legacy charged thereon; and the rule has been much limited, even as between the legatees and the heirs at law. Where the time of payment of a legacy is postponed for the benefit of the estate, and not with reference to any particular circumstances in relation to the legatee, the legacy becomes vested at the death of the testator;" (*Harris v. Fly*, 7 Paige R. 421; *Marsh v. Wheeler*, 2 Edw. Ch. R. 156) and is transmissible to the personal representatives of the legatee, although he dies before the time of payment arrives. Donner's appeal 2 Watts &

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Some discussion then took place as to the costs of the Attorney-General, who, it was contended on behalf of the defendant Wooler, was not a necessary party to the suit.

The *Vice-Chancellor* ordered that the costs of the Attorney-General should be paid by the plaintiffs.

THE decree after directing that the legacy bequeathed to Sarah Wooler, afterwards Sarah Gill, with interest thereon, should be raised out of the real estates charged with the payment thereof (the personalty being insufficient,) directed that the sum so raised should be paid to the plaintiffs, as executors of George Brown. And it was referred to the taxing Master to tax the plaintiffs and the Attorney-General their costs of this suit; with a direction that the plaintiffs should pay to the Attorney-General his costs of this suit, when taxed.

Serg. 372. Where there is no distinct gift of a legacy charged on real estate, but the time of payment is annexed to the gift and postponed on account of the minority of the legatee, the legacy lapses by the death of the legatee before the time of payment; but where it is postponed for the benefit of the devisee of the estate charged, the legacy is vested. In this case, a testator devised to his son land which he charged with a sum of money in equally instalments, three of which were directed to be paid as follows, viz. "the seventh payment to be paid to my daughter J. when she arrives at the age of 21 years; the eighth payment also to be paid to my said daughter J. when she arrives at the age of 22 years; the ninth payment also to be paid to my said daughter J. when she arrives at the age of 23 years." J. died before the age of 18. *Held*, that it was a vested legacy; that in this case the time of payment was postponed for the benefit of the son, to whom the land charged with the legacy was devised, and therefore within the exceptions to the general rule. See 3 Yeates R. 368. 4 Rawl. R. 440. 2 Atk. 127, 130, and notes to Saunders' edition of Atkyns. *Emes v. Hancock*, 2 Atk. 507. 1 Roper on Legacies, 436. *Dawson v. Killet*, 1 Bro. C. C. Perkins Ed. 124, note of Mr. Eden. *Kibler v. Whiteman*, 2 Har. 401. *Watkins v. Cheek*, 2 Sim. & Sta. 199. *Hunter v. Judd*, 4 Sim 461. *Leming v. Sherrott*, 2 Haro. 18. *Hanson v. Graham*, 6 Ves. 246. 9 Cl. & Fin. 583, 591. As to the effect if the words "payable" or to be paid are omitted, and the legacy is given at 21 or if, when, in case or provided, the legatee attains 21, or any other future definite period, and that in such case the interest of legatee is contingent, and depends for its vesting, and its transmissibility to his executors or representatives on his being alive at the period specified, see *Marsh v. Wheeler*, 2 Edw. Ch. R. 156. *Bunch v. Hurst*, 3 Desaus. 286. *Rose v. Sowerby*, Taml. 376. *Lister v. Bradley*, 1 Hare, 10. *Watson v. Hayes*, 9 Sim. 500. *Breeden v. Tugman*, 3 Myln. & K. 289. *Kibler v. Whiteman*, 2 Har. 401. *Jackson v. Wynne*, 7 Wend. 47. *Butcher v. Leach*, 5 Beav. 392. *Caldwell v. Kinshead*, 1 B. Mon. 231.

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*ATTORNEY-GENERAL V. CUMING.

[*139]

1843 : Feb. 15th, 16th, 17th, and 18th.

By deed, the advowson of the vicarage of C. was vested in nine trustees, upon trust, from time to time as an avoidance should occur, that they or the major part of them, within the space of four calendar months next after such avoidance, should publish notice in the parish church, upon two several Sundays, immediately after divine service, of a certain time for the meeting of the parishioners within such four calendar months, for electing a vicar ; and should within six calendar months next after such avoidance, by writing under their hands and seals, present to the ordinary for institution and induction, as vicar, such clerk as should be elected by the parties therein mentioned. By the terms of the deed, the election was to be by parishioners having a certain qualification in land in the parish, "or the major part of such parishioners, together with the trustees as aforesaid, or the major part of them then assembling in or at the parish church or market-house of C., within the said four calendar months." On the occasion of an election in 1840 there were eight trustees ; two of whom were out of the jurisdiction. Of the remaining six, five signed a written notice of the intended election, which notice was duly published pursuant to the deed, though previous to the publication one of the signatures was erased. The same five attended at the meeting which was held within the proper time, and four of them voted for the successful candidate. These four and the trustee within the jurisdiction, who was not present at the meeting, joined in the presentation, which was subsequently approved of by the trustees out of the jurisdiction. The remaining trustee refused to join in the presentation :—*Held*, that the election was valid ; that the dissentient trustee was bound to give effect to it by joining in the presentation, and that the bishop, subject to any question arising as to professional unfitness in the clerk, or corrupt, simoniacal, or scandalous proceedings at the election, was bound to present.

By a deed of trust of 1682, for the appointment of a vicar, it was declared, that, upon the death of any of the trustees, the survivors should, from time to time, when and as often as they should think fit, before the number of trustees should be reduced to the number of five, or within three months after they should be reduced to the number of four, appoint new trustees, and convey the premises to them, so as to complete the number of nine trustees. It appeared that, from the date of the deed to the election of a clerk in 1840, this clause had never been strictly acted upon, though the number of the trustees had generally been kept up to nine :—*Held*, that the informality in the appointment of the trustees did not vitiate the election.

By an indenture of bargain and sale, dated the 19th April, 1682, and made between John Hunt, of the one part, and nine persons therein named, of the other part, the advowson, donation, patronage, right of patronage, gift nomination, presentation, and free disposition of and to the vicarage of the parochial church of

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Chudleigh, with the rights, members, and appurtenances, and all houses, glebe lands, tithes, &c., were conveyed to the parties thereto of the second part, to hold the same upon the trusts declared in and by an indenture of even date therewith.

By the last-mentioned deed it was declared, that, from time to time and at all and every time and times for ever thereafter, whensoever and so often as the then present or any future vicar or incumbent of the vicarage of the parochial church of Chudleigh should happen to depart this life, or the said vicarage should become void, or want a vicar or *incumbent, [*140] by death, resignation, deprivation, session, or any other way or means whatsoever, then and in every such case the said trustees or the major part of them, and the survivors of them, and their succeeding trustees, and the survivors of them, or the major part of them for the time being, within the space of four calendar months next after such avoidance of the said vicarage, should and would publish and give notice and warning in the parish-church or churchyard of Chudleigh aforesaid, upon two several Sundays immediately after divine service, of a certain day or time for a meeting of the parishioners of the said parish of Chudleigh at or in the parish-church there, or church-house, or the market-house of the same parish, within the said four calendar months, for the electing and nominating of one fit, pious, and orthodox divine in orders, to be vicar and incumbent of the said vicarage; and that the said trustees, or the major part of them, and the survivors of them and their succeeding trustees, and the survivors of them or the major part of them, within the space of six calendar months next after such avoidance of the said vicarage, should, by writing under their hands and seals, present to the ordinary of the diocese for the time being, to be instituted and inducted to the said vicarage, such fit and orthodox divine in orders as the parishioners of the said parish of Chudleigh, whereof every one having an estate in possession of inheritance or freehold, or for any number of years above twenty years, absolute, or determinable upon the death of any one, two, or three person or persons, of or in any messuages, lands, tenements, or hereditaments, lying and being within the town, borough or parish of Chudleigh, which should

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be then rated or valued in and by rates made for the maintenance of the poor of the said parish of the yearly value of 5*l.* or upwards, or the major part of such parishioners, together with the trustees as aforesaid, or the major part of them, then assembling in or at the parish-church or church-house or *market-house of Chudleigh aforesaid, within the said [*141] four calendar months next after such avoidance as aforesaid, and upon such notice and warning first given and published as aforesaid, should elect, nominate and appoint.

The deed then contained a declaration, that, in case such parishioners of the said parish for the time being, or the major part of them, should not in such manner and at such time and place as was thereinbefore limited or appointed for such election and choice of such vicar and incumbent after such avoidance, make such election, nomination, choice, or appointment, then and in every such case, and in default, disagreement, or neglect thereof, it should and might be lawful to and for the said trustees, or the major part of them as aforesaid for the time being, to present to the said ordinary of the place as diocese for the time being such orthodox divine as aforesaid, as the trustees for the time being, or the major part of them, by writing under their hands and seals, to be by them respectively sealed and subscribed in or at the parish-church or church-house, or market-house of Chudleigh, in or upon one of the four last days of the fifth calendar month next after such avoidance, should elect, nominate, and appoint to be vicar or incumbent of the said vicarage; and in default also of such election, nomination, and appointment, or disagreement or equality of voices of the said trustees or the major part of them, that then any two or more of the trustees for the time being, whereof the eldest and most ancient in years to be one, should by writing under their hands and seals elect, and present such an orthodox person as aforesaid to the ordinary of the diocese for the time being, to be admitted, instituted, and inducted into the same vicarage.

The deed then proceeded to declare that when and so often as it should happen that any of the said then trustees, or any of the number of nine such persons as should from time to time thereafter be named, made and *appointed trustees for [*142]

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or concerning the premises, should be dead, or have relinquished or acquitted the said trust, then and in every such case the said surviving trustees should and might from time to time, and at all times, when and as often as they in their discretion should think fit, before the said trustees should by death or otherwise be abated or reduced to the number of five persons, or within three months next after the said trustees should by death, relinquishing the said trust, or otherwise, be lessened or reduced to the number of four persons, (and in case they should disagree or be equal in voices, then any two of them, whereof the eldest and most ancient in years to be one,) grant, convey, and assure the said advowson, patronage, and premises, unto such other persons and parishioners of the said parish of Chudleigh as such surviving trustees for the time being should in that behalf elect, nominate, and appoint, to hold to them and their heirs, to the use of such surviving trustees, and of such other persons so to be nominated and appointed for new trustees as aforesaid, and of their heirs and assigns for ever; whereby the number of nine trustees and no more might be again completed and made up, upon and under the several trusts thereinbefore declared: to the end the said advowson and premises might for ever thereafter remain and continue from trustees to trustees successively, and the said trust be executed, preserved, and performed, for the ends, intents, and purposes aforesaid, according to the purport, true intent, and meaning of those presents.

In 1709, there were only two surviving trustees, who, by indentures of lease and release, dated respectively the 26th and 27th of April, 1709, conveyed the advowson, so as to vest it in themselves and the seven new trustees. In 1734, there were only four surviving trustees, who, in like manner, by indentures of lease and release of the 12th and 13th of August, 1734, conveyed the advowson to themselves and five new trustees.

[*143] In 1754, there were only *three surviving trustees, who, by indentures of the 23rd and 24th September, 1754, in like manner conveyed the advowson to themselves and six new trustees. In 1780, there were only three surviving trustees, who, by indentures of lease and release of the 21st and 22nd of March, 1780, in like manner conveyed the advowson to them-

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selves and six new trustees. In 1810, the number of the trustees was reduced to four, but no new appointment was made until 1822, when there were only two trustees surviving, who, by indentures of lease and release of the 28th and 29th of November, 1822, conveyed the advowson to themselves and seven new trustees. In 1838, the number of the trustees was reduced to six, namely, John Inglett Fortescue, Sir Lawrence Vaughan Palk, Thomas William Taylor, John Dicker Inglett Fortescue, George Templer, and Gilbert Burrington, who, on the 9th of May, 1838, conveyed the advowson to themselves and three new trustees, namely, Montague Edmund Newcombe Parker, Lord Exmouth, and Sir Robert Newman.

Upon every avoidance of the vicarage between the date of the deed of trust and the events which were the subject of this suit, a new vicar had been elected according to the provisions of the deed, and the trustees, or the major part of them, had always within six months after the avoidance presented the clerk so elected to the bishop, who thereupon instituted and inducted him into the vicarage. Upon the election and presentation of Gilbert Burrington, the last vicar, in 1785, the seven surviving trustees acted throughout the proceedings.

On the 26th of September, 1840, the late vicar, Gilbert Burrington died, and on the 10th and 17th of January, 1841, notice in writing was given by the trustees of a meeting of the parishioners in the market-house, for the purpose of electing a new vicar. This notice was signed by five of the trustees, of whom Sir R. Newman was one. His name was subsequently at his own request erased. On the 21st and 22d of January, the election took place, "when the Rev. W. H. Palk was [*144] elected by 89 against 68 voters; five of the trustees (of whom Sir R. Newman was one) being present, and voting. The Rev. Joseph Cuming was the only other candidate.

At the time of election, Lord Exmouth and John Dicker Fortescue were abroad, and John Inglett Fortescue was dead, so that there were but six trustees who could take part in the election. Lord Exmouth and John Dicker Fortescue, however, subsequently to the election, signified their assent to Mr Palk's appointment.

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After the proceedings at the election had closed, a paper was signed at the foot of the poll-book by four of the trustees who were present, and who had voted for Palk, the purport of which was, that they being *the major part of the trustees then duly assembled* at the market-house at Chudleigh, for the purpose of electing, &c. &c., together with the major part of the parishioners duly qualified, &c., had elected the Rev. W. H. Palk, M. A., to be vicar. Mr. Burrington, however, the fifth trustee, who was present, and voted for Cuming, declined to sign this document, and protested against the election.

Within the time prescribed by the deed, viz. six months, five out of the six trustees then in England, one of whom, Taylor, had not been present at the election, presented Mr. Palk to the Bishop of Exeter, for institution and induction. His lordship, however, under the circumstances, refused to admit him.

In consequence of this refusal on the part of the Bishop of Exeter, the present information and bill were filed at the relation of the Rev. W. H. Palk, and two other persons, on behalf of themselves and all other the parishioners of the parish of Chudleigh, &c., (stating their qualification) plaintiffs, against the Rev. Joseph Cuming, the trustees, and the bishop praying, that it might be declared that the plaintiff W. H. Palk had been duly elected and nominated to, and ought to be presented to and [*145] instituted and inducted into the vicarage, and for that *purpose that the trustees might be ordered to make a valid and effectual presentation of him; and that upon such presentation the Bishop of Exeter might be ordered to institute and induct him; and that the defendant Burrington might be decreed to join in the presentation, or that he might be removed from his trusteeship, and that proper directions might be given for the execution of the trusts of the indenture of the 16th April, 1682; and that the Bishop of Exeter might be restrained by injunction from instituting and inducting the defendant Cuming, or collating or instituting any person to the vicarage.

Before the answers were filed, the plaintiff, Mr. Palk, obtained an injunction pursuant to the prayer of the information and bill; and that injunction, on motion before the *Vice-Chancellor of England* to dissolve it, was continued.

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The defendant Cuming, by his answer, stated that he believed he had been elected by a majority of legal votes, but for prudential reasons he had disclaimed, and by his answer did disclaim, all right and title in and to the vicarage, and all objection to the election of Mr. Palk.

The defendant Burrington, by his answer, stated that he refused to concur in the presentation of Mr. Palk, because he believed that he was not elected by a majority of legal votes, and because, with perfect respect for Mr. Palk's character, he did not think him the most fit person to be vicar of a large parish. But, inasmuch as Mr. Cuming had withdrawn from the contest, he the defendant was ready and willing, if the Court should consider the election valid, to join in any act which should be necessary for completing Mr. Palk's legal title.

The defendant the Bishop of Exeter, by his answer, alleged as grounds for his refusal to admit Mr. Palk's claims, first, the illegality of the presentation; and secondly, the indecorum and impropriety of the proceedings which, as he alleged, attended Mr. Palk's election. He insisted that the presentation was illegal; first, because five only of the *trustees, so [*146] called, joined in it, whereas the legal ownership was in all the eight; secondly, because the vacancies in the number of the trustees had not from time to time been filled up according to the provisions of the original deed of trust; and thirdly, because Mr. Palk had not been duly elected by a majority of the parishioners duly qualified to vote (some of them being resident out of the parish,) or by a majority of the trustees of the advowson for the time being. He also noticed as an additional objection to the validity of the election the fact that Sir L. J. Palk, who had been a trustee previously to May, 1838, had not executed the indentures of the 7th and 8th May, 1838 (whereby the legal estate was vested in the present trustees,) until the 22nd January, 1841, being the second day of the election. Under all the circumstances, the Bishop averred that he had, without any imputation on Mr. Palk's character, refused to institute and induct him, and did intend, when the injunction which had been granted should be dissolved, to exercise his right of collation or presentation by lapse.

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The cause now came on for hearing.

The Bishop entered into evidence of some length, though not very precise in its nature, as the alleged indecorum in the proceedings at the election. The grounds on which the judgment proceeded render it unnecessary to state that evidence.

Mr. *Russell* and Mr. *Elmsley*, for the plaintiffs.—If any of the trustees had stated to the Bishop, on probable grounds, that Mr. Palk had not been duly elected, it might have been reasonable for the ordinary to refuse to institute him till the matter in dispute between the trustees had been adjusted: *Edenborough v. Archbishop of Canterbury*.(a) But here that ground has not been taken by the ordinary, nor indeed could it: because [*147] though five only of the *trustees joined in the presentation, yet every trustee but one concurred in it, and the dissentient trustee no longer opposes. The only antagonist therefore is the ordinary, and he suggests every possible objection to the plaintiff's equity. The objection that new trustees have not been appointed at the times prescribed by the deed is immaterial in a case of this nature. The deed of trust is merely directory in that respect, and the neglect of trustees in not following the exact course prescribed will not be held to prejudice the plaintiffs: *Attorney-General v. Floyer*.(b) Then there is nothing in any of the objections of the Bishop which gives him a right of lapse. The equitable owners of the right of presentation come here by information and bill to give effect to a presentation which in equity has been rightly made; the bishop cannot resist that relief on the ground of his legal right of lapse: *Nicholson v. Knapp*.(c) It never has been held that to constitute a valid presentation all the parties having the legal estate should join. The objections of the bishop as to the validity of the election are answered by the words of the deed of trust. The words "parishioners," qualified as they are, will comprehend persons resident out of the parish, and it is clearly sufficient if the party be elected by the majority of the parishioners and trustees present at the meeting: *Wilkinson v. Malin*,(d) *Cortis v.*

(a) 2 Russ. 93.

(c) 9 Sim. 326.

(b) 2 Vern. 748.

(d) 2 Tyrw. 544; 2 Cr. & J. 636.

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Kent Waterworks Company.(a) As to costs, the bishop, having entered the arena of ordinary litigants must take the consequences.

Mr. Wood and Mr. Neate for the defendants, the trustees, except Burrington, in addition to the other cases, referred to *Attorney-General v. Parker.*(b)[1]

*Mr. Swanston and Mr. Follett for the defendant Burrington. [*148]

Mr. Kennion appeared for the defendant Cuming.

Mr. Wigram and Mr. Prior, for the Bishop of Exeter.—Where joint tenants are entitled to the patronage, the bishop is not bound to accept the party presented, unless all concur in the presentation: *Co. Litt.* 186. b. In this case it has always been usual to require the concurrence of all the trustees in the presentation of the clerk to the ordinary.

The deed declares that new trustees shall be appointed when the number is reduced by death or resignation to five, or within three months after the number has been reduced to four. In 1810 the number was reduced to four, and new trustees ought to have appointed; but no new appointment took place until 1822, when the number had been reduced to two. That was clearly a bad appointment. The power of appointing new trustees was to be exercised before the numbers were reduced to four. It is not a general power with a subsequent direction as to the manner in which it shall be exercised; and that differs this case from the case in *Vernon*. Besides, by the terms of the trust deed, the electors are constituted of two classes, and the concurrence of each class is necessary to constitute a valid election: *Rex v. Morris*,(c) *Rex v. Bower*.(d)

With respect to the question of lapse, the bill assumes that

(a) 7 B. & C. 314. (b) 3 Atk. 576. (c) 4 East, 17. (d) 1 B. & C. 492.

[1] See *Daly v. The Archbishop of Dublin*, 1 Flan. & Kel. 263; *Potter v. Chapman*, Amb. 98; *Attorney-General v. Bishop of Litchfield*, 2 Ves. 828; *Milligon v. Mitchell*, 1 Myln. and K. 446.

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there is a lapse of law. It prays, not that the alleged presentation may be perfected, but that a new presentation may be made. The only case in which a court of equity will relieve against a legal lapse is where the party has got a clear [*149] equitable title within the six months and there "have been no laches. Here the notice was not published till more than three months after the incumbent's death, the information was not filed till March, 1841, and two of the trustees during part of the time were abroad. Under these circumstances, the Court cannot interfere with the right of the bishop to collate, which has accrued to him in the ordinary course of law: *Gibs. Cod.* 769. Supposing, even, there were no lapse, has the Court ever compelled a bishop to institute upon any presentation whatever?

Lastly, the plaintiffs are wrong in having filed an information: *Attorney-General v. Foster.*(a)

THE VICE-CHANCELLOR.—Having had opportunities of considering, and having arrived at a conclusion as to some points of this case, I think it convenient to declare that conclusion now so far as it extends. A doubt at least was suggested during the argument, and had before occurred to my own mind, whether this was a proper case for an information. It is, however, an information and bill. The information and bill are severable; and supposing it to be a case in which the Court ought to act either upon information and bill, or upon information or bill, there could be no substantial difficulty in dealing with the record, on account as I have said of the severable nature of its two portions. If I were to dismiss the information only, or to dismiss the bill only, that mere circumstance would not in my view make any difference as to the costs, and therefore I shall not think it expedient, in the event of giving any relief at all in this case, to dismiss either the information or the bill, or to make any apparent severance in the decree. It is not necessary, therefore, to express any opinion whether this is or is not a proper case for an information and bill.

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The next question raised in the argument has been with *regard to the validity of the appointment of trustees [*150] which took place in 1822. It appears that, when the new trustees were appointed in 1822, two only of the old trustees were alive, and they had been reduced to the number of two much more than three months before the time when the appointment was made. This mode of appointment, therefore, was not such as the deed required or directed, whichever may be the more proper expression to use. It does not appear, however, that there was any fraud or concealment. The appointment may or may not have been known generally in the parish, but the appointment related to a subject which was of general interest in the parish; if not known, it might have been known; and I cannot therefore assume, upon the pleadings and evidence as they are before me, that the appointment of 1822 was unknown to those among whom it was made, and who were interested in the knowledge. Taking that to be so, this appointment of trustees had been in force for more than seventeen years, certainly before the period when the powers of the trustees were brought into action after the death of the late vicar. The trustees new and old had acquired the legal estate in the advowson. They had had it ever since 1822. As to that no doubt has been suggested; and whatever doubt may otherwise than judicially be entertained upon the subject, I am not at liberty, on the pleadings and evidence as they stand before me, to suppose that any of the trustees were not properly qualified. It appears to me, that, in such a state of things, even assuming the appointment to have been originally irregular in that only point more or less material on which it is alleged to have been irregular, this Court, if complaint had been made on the subject at the time, or shortly before the time, when the election took place or when the notices were given, would have declined to interfere for the purpose of removing the actual trustees. When to that consideration I add that throughout the transaction in *question, the validity of the appointment [*151] of 1822 has never been questioned; but that the existing body of trustees consisting partly of the survivors of those who

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were appointed in 1822, and partly of those who were appointed by them, have been, during the whole of the matters that are before me, accepted and recognized in this character, whether there was or was not any such irregularity as has been suggested with respect to the appointment of those trustees, no other irregularity having been suggested, I am of opinion, that, for all the purposes of the present suit, I must take the appointment of 1822 to have been valid and sufficient.

The next question raised has been with regard to the notice of the election. The notice was not a merely ministerial or formal act. It is obvious that the time that might intervene between the first and second notice and the time of election was material; and there was a discretion to be exercised also as to the place of election. This notice, however, was not required by the terms of the trust-deed to be in writing; and it was a notice which in some shape and in some manner it was the duty of the trustees or the major part of them to give. To have omitted to give that notice would have been a breach of trust. It was therefore incumbent on the trustees, or such of them as were in a condition to act, to do it in the best manner they could. The trustees had before this time been reduced to eight by the death of the elder Mr. Fortescue. Of the remaining eight, two, namely, the younger Mr. Fortescue and Lord Exmouth, were abroad. There remained, therefore, within the realm, only six persons capable of acting. Of these six, five, forming an absolute majority of the whole number, signed the notice. It appears to have been signed in December. After it was signed, but before any publication consequent upon it, one of the five (five being clearly sufficient for the purpose) desires to have his name [*152] struck through. Now, I am not clear that the striking through the name as it was struck through, or the attempted revocation of that signature, was not an act merely invalid. I am not at all satisfied, that, after the act had been done by Sir Robert Newman, considering what the character of the act was, it was competent for him to revoke it. On that point, however, it is not necessary to state any decisive opinion. As I have said, it was not necessary that the notice should be in writing. The notice was published, the notice was acted upon,

and the very person, Sir Robert Newman, whose name had been thus erased, attends and presides at and actively co-operates in the election. Considering that at no period was any objection, as far as I can learn, taken to the validity or sufficiency of the notice, that it is nowhere alleged that all the persons entitled to vote had not full knowledge of the intended election and the opportunity of voting, if they chose ; taking all these facts and circumstances together, it would in my judgment be erroneous to hold, that, for the purposes of this suit, the notice was insufficient.

I perhaps should have mentioned earlier the objection suggested, that the deed of appointment of 1838, by which three new trustees were added to the trust, namely, Lord Exmouth, Sir Robert Newman, and Mr. Parker, was not executed until the second day of the election by Sir Lawrence Palk, one of the former trustees. Considering, however, that the deed had before that time, and I must suppose in the year 1838, been executed by Mr. Fortescue, Mr. Taylor, Mr. Burrington, Mr. Templer, and Mr. Parker, I am of opinion that the late period at which Sir Lawrence Palk, being only one of such a number as I have mentioned, executed it, was immaterial to the case ; and for the reasons I have stated I consider, that, for all the purposes of this suit, those gentlemen were regularly the trustees of this advowson.

The next question is with reference to the validity of the election ; and it is impossible that, upon the materials before me, I can with anything like propriety come to a judicial conclusion, that Mr. Palk had not the majority of legal votes, that is, the majority of the votes of the persons voting who were entitled to vote, whether the trustees were or were not entitled to vote. It has been suggested, however, that, according to the true construction of this deed, the trustees, as trustees, were an entirely separate body, of voters, and that an absolute majority of the whole number of trustees, not a majority of the number present, must, as a separate body, confirm the election. To establish that proposition, those who make it must prove both parts of it ; the first part being, that the trustees were a separate body, and the next, that, if a separate body, the majority of the absolute majority of the whole pre-

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sent at the election could not act for the body. In my opinion, those who state that proposition have not established both parts of it; and upon the true construction of this deed, and upon the facts that have taken place, I am of opinion that the fact of Mr. Burrington having at the conclusion of the election dissented, and refused to sign the two documents which were signed upon the poll-book by the four other trustees who were present, is a circumstance not affecting the validity of the election.

Supposing the election valid, it became then the duty of a majority of the trustees to sign the presentation; and supposing the election valid, it was in my opinion sufficient for all purposes, including the just requisitions of the ordinary, that a majority of the trustees should perform that act consequent upon the election. If indeed the election had been invalid, then the state of things would not have arisen, which, as far as the ordinary was concerned, would have made a signature by a majority of the trustees sufficient. I do not say whether doubt might or might not have been reasonably entertained upon it, but the judicial conclusion to which I come is, that supposing the [*154] *election valid, it was immaterial that one of the five who signed the presentation was not present at the election, and that the dissenting trustee at the election did not sign the presentation.

His Honor then called on the plaintiff's counsel to reply as to the other parts of the case.

Mr. *Russell*, in reply.

THE VICE-CHANCELLOR.—The main question in this cause is, in effect, one merely of title to real estate,—a particular description of real estate certainly,—but still a question merely of title to real estate. If, independently of the mere question of title, it had been alleged and proved on this record that there had been illegal proceedings such as to vitiate the act in question, to make it plainly unfit to be acted upon, the consequence probably might have been, that, though a matter not under the circumstances directly to be tried by this Court, it might have proved a ground for dismissing the bill. Illegal proceedings, however,

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have not been alleged or proved. No question as to any illegality in the mode of acting prior to the presentation or otherwise is before me. And I apprehend that whatever I may do in this case on the question of title, other questions, if there be any, will remain exactly as much open to the bishop as the question of Mr. Palk's fitness, with which this Court has nothing to do. I profess only to decide upon the mere question of title, without any reference whatever to the question whether there have or have not been any illegal proceedings, beyond this—that I do not consider that they are in issue before me. I do not intimate any opinion whether there have or have not been any illegal proceedings: but I do in effect decide, (and the decision must be expressed in the usual form of this *Court, as I [*155] desire not to bind myself to any particular form of language,) that the presentation signed by Sir Robert Newman, Sir L. Palk, Mr. Templer, Mr. Parker, and Mr. Taylor, and laid before the bishop, is and was sufficient, and by a good title; and that by virtue of it, Mr. Palk, if found by the bishop to be a fit person, ought to be instituted and inducted into the living; continuing the injunction until further order with liberty to apply.(a)

Then it remains to dispose of the costs. There is no doubt a degree of difficulty in this case, arising from the absence of any available trust fund. There are, however, as plaintiffs on this record, in effect all those for whom the trustees stand in the character of trustees, because the bill is by certain of the qualified voters of the parish, on behalf of themselves and all other the qualified voters, and there never has been any other suit. I must take it therefore that those who are interested in the subject have not thought it worth while to take any proceedings at variance with this, or to dissent from the present proceeding, and at least the six trustees who appear together have done nothing, as it seems

(a) Some discussion here took place as to the propriety of that part of the decree in *Edenborough v. Archbishop of Canterbury*, which directs that the bishop "do institute and induct." The *Vice-Chancellor* observed that such an order taken literally would exclude the bishop from the right of deciding upon the fitness of the party presented; and his Honor therefore thought that the particular words there used could not have been brought to Lord Eldon's attention.

to me, at variance with the trust. They must have their costs, therefore, as between solicitor and client, from the cestuis que trust, and those cestuis que trust are the plaintiffs.

It had at one time occurred to me, before I was made fully aware of the state of the pleadings, that a question might arise whether Sir Robert Newman could be entitled to his [*156] costs, because though no one has attributed *to him any improper motive in what took place, yet there was an irregularity ; but the state of the pleadings does not raise that question as between the plaintiffs and Sir Robert Newman. Therefore it is unnecessary to express any opinion upon it, and I shall draw no distinction between Sir Robert Newman and the other gentleman with whom he acts.

The next question is as to Mr. Burrington. Now he is a trustee, who has acted separately. When trustees act distinctly, and conduct their cases severally, before the cestuis que trust can be called upon to pay two sets of costs, some good reason must be given. No reason has been given why the trustees, acting together, appearing as one body, should not have their costs. They cannot be refused, in my opinion, as I have stated. With regard to Mr. Burrington however, he has acted separately on this ground, that, though not now opposing Mr. Palk's title, he originally dissented from it ; and he, conscientiously no doubt, thinks, without any disrespect to Mr. Palk, that Mr. Cuming is a preferable person. He has a right to entertain, and to express, and to act on that opinion, and also upon the opinion, as he has stated, that the majority of legal votes is against Mr. Palk. It is however established in my judgment, that, take the matter in whatever way it can be suggested as rationally possible, Mr. Palk had the legal majority, and that statement therefore on the part of Mr. Burrington, though no doubt believed by him, fails. It is a statement founded on mistake. But with the belief of the preference due to Mr. Cuming over Mr. Palk, he does that which is calculated to create a difficulty in the title ; for instead of joining, when the matter was carried against his views, in giving effect to the election, which notwithstanding his dissent is proved to have been properly carried, he omits to sign the presentation ; thereby doing that

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which might well create difficulty and doubt *in the [*157] title. Whether that was or was not the main ground taken by the bishop is not material. It was a step against the title out of the ordinary course, and calculated to create difficulty. I think, that, considering the line which Mr. Burrington has, no doubt conscientiously taken, and without imputing any blame to him, it is not a case in which I can allow a double set of costs ; but as between the two sets of trustees, those acting together are rather entitled to their costs, under the circumstances of the case, as against the plaintiffs, than Mr. Burrington. I do not, however, think it a case in which Mr. Burrington should be fixed with costs ; therefore, as far as he is concerned, there will be no costs on either side.

With respect to Mr. Cuming, he has disclaimed ; he has given no trouble ; he has created no difficulty in the suit ; though he certainly at one time claimed. 'There appears to have been a fair opposition between these two gentlemen, in which Mr. Cuming has not succeeded ; and I think there is not sufficient ground, considering that he does disclaim, on which he should be refused his costs ; but under all the circumstances of the case, I will take upon myself to moderate those costs. I shall therefore direct Mr. Cuming's costs to be taxed, but with liberty to the plaintiffs to pay him 20*l.* in full instead of a taxation, if they shall think fit to do so.

Then comes the consideration of the costs of the bishop. In the first place, the presentation here was, as I collect, different in form from any that had preceded it, for whereas in all former cases the presentation had been by all the trustees, as far as I can collect, and, as far as any statements made to me enable me to judge, this presentation was by only five of the number. The presentation, as I have said, was out of the ordinary course. It was not only signed by five only of the trustees, but those five trustees were not all who were within the realm. Not only *so, but those five trustees did not include one who [*158] was present at the election, and did include one who was not present. It was a matter therefore naturally calculated to create observation and inquiry. I must assume that even if no communication had been made to the bishop on the subject,

this state of things must, because in my judgment it ought to, have led to an inquiry on the part of the ordinary. That inquiry would have led to a knowledge of the circumstances that preceded and accompanied the election.

Now, I quite accede to the observation that has been made, that this is a trust recognized by the law. Being so recognized, it is a trust, from the exercise of which some inconveniences and improprieties of the description alleged are almost inseparable, and will be, so long as electors are men and women. Still moderation in all things is desirable, and I cannot but think, looking at what took place in the parish at the time of the election,—looking, however, at the evidence on this subject with all necessary caution and reserve, not merely on the ground of facts not being put in issue, but on other grounds also—I cannot but think that there was quite enough to create in the mind of the ordinary great disapproval of what had taken place, a strong desire to correct it, and a strong desire to prevent, if by any lawful means he could, the repetition of such proceedings, and thoroughly to investigate the circumstances. This must naturally have led him to hold his hand for a certain time upon the matter, until further inquiry had been made. Indeed, if I may presume to give an opinion upon it, it was positively his duty to have an investigation made. His lordship, however, found such strong ground of disapproval, that the course taken by him has been, not to confine himself to the investigation of those matters, but to go into the actual title, independently of them, with a [*159] minuteness and rigor of detail which have *seldom been exceeded. Now, no man has expressed a doubt, and I think no man can doubt, that the bishop in so doing was actuated by the best and highest motives; still, however, his lordship has been led to place himself in a position of difficulty, by going beyond the mere question of the impropriety of the proceedings that took place, which, in my opinion, demanded investigation. When I add to this consideration, that of the unsuccessful motion made to dissolve the injunction,—a step which his advisers might well have omitted to advise his lordship to take,—I do not see my way to take any other course in the present case than to direct, on the ground of these conflicting considerations, that,

1843.—Attorney General v. Cuming.

as between the bishop and the plaintiffs, there should be no costs on either side.

With respect to Mr. Palk, I will only add that I am satisfied, if there was any thing illegal in the proceedings at the election, which I do not suggest, he was not aware of it, nor do I believe him to have had any notion that they would be attended with improper consequences.

FENNER v. HEPBURN.

1843: Jan. 17th; June 22d.

Although an agreement between an intended lessor and lessee may possibly amount at law to a present demise or assignment, yet if upon the face of the instrument it appears that a further instrument is necessary to carry the intention of the parties into execution, a Court of Equity will decree specific performance of the agreement in that particular.

JOHN HOWLETT FENNER was lessee of certain premises at Clapham, under a lease for 21 years, from the 29th September, 1835, at a rent of £140 *per annum*, subject to a proviso enabling the tenant to determine the lease at the end of seven or fourteen years. J. H. Fenner died in February, 1840, having, by his will, appointed his son, Ludd Fenner, and two other persons, his executors.

Ludd Fenner, upon the death of his father, entered into possession of the premises. Some months afterwards, he *entered into an agreement with Thomas Hepburn, [*160] which was signed by the parties, and was as follows:—

“Memorandum of agreement made this 4th day of June, 1840, between Ludd Fenner, of &c., of the one part, and Thomas Hepburn, of &c., of the other part. The said Ludd Fenner, in consideration of the sum of £20, to be paid him by the said Thomas Hepburn, agrees to let to the said Thomas Hepburn, and the said Thomas Hepburn agrees to take the late Mr. Fenner's house and premises at Clapham aforesaid, for the term of sixteen years from Michaelmas next, at the clear yearly rent of £170, commencing from Christmas next, and payable quarterly; all taxes and outgoings to be cleared to Christmas next. The

1843.—Fenner v. Hepburn.

said Thomas Hepburn is to be subject to all the same covenants and conditions (except the amount of rent,) as are contained in the lease held by the late Mr. Fenner. And it is hereby further agreed by and between the said parties, that the said Thomas Hepburn shall take at a valuation all the tenant's fixtures in and upon the said premises belonging to the said late Mr. Fenner, but which valuation is not to exceed the sum of £250. If the valuation exceed that sum, then £250 shall be considered as the full amount thereof."

In pursuance of this agreement, Hepburn was let into possession of the premises at the ensuing Michaelmas, and paid for the fixtures.

In November following, a draft lease of the premises was prepared and sent by Fenner's solicitor to Hepburn's solicitor. The draft was in the form of a lease for sixteen years wanting one day, and it contained no power to the tenant to determine the lease at any time short of the sixteen years. In other respects, except as to the difference of rent, it was in the same form as the original lease to Fenner.

A few days after the receipt of this draft it was re-
[*161] turned "by Hepburn's solicitor, who had introduced a clause for making the lease determinable by the tenant at the end of two or nine years of the tenancy; those periods corresponding with the periods mentioned for the same purpose in the original lease. Hepburn's solicitor subjoined a note of his approval of the draft, as altered, on behalf of the lessee. He also stated that he made no objection to the form of the lease as an underlease.

The parties not agreeing as to the clause so introduced, the present bill was filed by Fenner against Hepburn and Fenner's co-executors, praying that the agreement might be specifically performed.

The cause now coming on for hearing, it was arranged, by consent, between the parties, that the opinion of the *Vice-Chancellor* should be taken as to the construction of the agreement, without a previous reference to the Master.

In support of the plaintiff's case, his counsel proposed to examine one of the defendants, the co-executors. But, upon the

 1843.—Fenner v. Hepburn.

Vice-Chancellor observing that the defendant, not having disclaimed, treated himself as having an interest in the suit, this course was not persevered in.

Mr. *Wigram* and Mr. *Wood*, for the plaintiff.—This is an agreement which the Court will render perfect by means of a more formal instrument. The words “subject to all the same covenants &c.” show that something more was intended to be done by the parties to complete the transaction. It will be contended on the other side that the present instrument amounts to an immediate assignment. If so, the defendant by assigning to a pauper will be able immediately to rid himself of the covenants and conditions of the original lease, notwithstanding the agreement expressly provides for the performance of those covenants during the whole term. It is clear that the parties contemplated the relation of landlord and tenant for [*162] the whole sixteen years. If the defendant has power to determine the lease at the time mentioned, the plaintiff will lose part of his security for the £30 *per annum*, the difference between the head rent and the under rent. The words “subject to the covenants” will not assist the defendant in his claim, because “subject” is a word of operation and not of privilege.

Mr. *Teed* and Mr. *Shapter*, for the defendant Hepburn.—If a doubtful agreement has been entered into which is open to a fair construction either way, the defendant ought not to be forced to take it. It is clear, however, that this is an assignment of the original lease, and being so, the lease is determinable as before. The words “subject to the covenants” does not make the defendant liable to the covenants for any longer term than he actually holds the premises: *Wolveridge v. Steward*.^(a) If they are to be held to have that effect in this case, then he ought on the other hand to have all the benefits of the lease. The defendant has no objection to an underlease, if made determinable at the times provided for by the original lease; but if he is not to have that benefit, then he rests on his legal right; insisting that this

(a) 3 Tyr. 637; 1 Cr. & M. 644.

 1843.—*Fenner v. Hepburn.*

is a present assignment and not a matter resting in mere agreement, which it is the peculiar province of a court of equity to enforce.

THE VICE-CHANCELLOR intimated that, whether this was or was not a present assignment, yet if it appeared from the agreement that a further instrument was necessary to carry the intention of the parties into effect, a court of equity would not refuse relief to a party seeking its aid in that respect.

[*163] *His Honor afterwards decreed as follows:—

DECLARE, That according to the true construction of the instrument of the 4th of June, 1840, a further instrument ought to be executed for carrying into effect the intention of it. Refer it to the Master to approve of a proper instrument for the purpose of carrying the agreement into effect. Reserve further directions and costs; with liberty to apply.

June 22nd.—The Master having prepared an instrument which was unsatisfactory to the defendant Hepburn, an exception (assigning various reasons) was taken to his report.

The following order was made:—

WITHOUT allowing or overruling the exception, by consent (the defendant Hepburn undertaking to find such security as hereinafter mentioned) let the defendant Hepburn propose before the Master a security for the sum of £30 per annum for the term of sixteen years mentioned in the agreement, whether the original lease shall or shall not be determined, such security to be in addition to his personal security. And if the Master shall approve of such security, refer it to him to approve of a proper deed of assignment from the plaintiff and his co-executors to the defendant Hepburn, of the house and property in question, for the whole of the said term of sixteen years: the Master, in settling such assignment, to have regard to the instrument of the 4th June, 1840, and to insert a proper provision for securing to the plaintiff such or the same rights, in the event of any breach of covenant on the part of the defendant, his executors, administrators, or assigns, as if the relation between them had been that of lessor and lessee * * * *. This order to be without prejudice to any question, in case such security as aforesaid shall not be tendered to the Master. * * * *

 1843.—Bennett v. Chudleigh.

*BENNETT v. CHUDLEIGH.

[*164]

1843: Jan. 26th.

This Court either by virtue of its general jurisdiction, or under stat. 11 Geo. 4 and 1 Will. 4, c. 36, rule 17, has power to discharge a pauper defendant out of custody, without compelling him to pay costs incurred previously to the order to defend *in forma pauperis*.

MOTION that the defendant having put in his answer might be discharged out of custody. It appeared that by an order dated the 3rd December, 1842, the defendant had been committed to prison for contempt in not answering. By an order dated 12th January, 1843, he had obtained permission to defend *in forma pauperis* and thereupon a counsel and six-clerk had been assigned to him, and he had put in his answer.

The question was, whether he could be discharged without paying the costs of his contempt.

Mr. Miller, for the motion, contended that both by the 17th rule of the stat. 11 Geo. 4 & 1 Will. 4 (a) and under *the general jurisdiction of the Court, the defendant [*165] could be discharged without payment of the costs incur-

(a) The 16th rule of stat. 11 Geo. 4 and 1 Will. 4, c. 36, is thus:—

That where a person shall be committed for a contempt in not delivering to any person or persons, or depositing in court or elsewhere, as by any order may be directed, books, papers, or any other articles, or things, any sequestrator or sequestrators appointed under any commission of sequestration, shall have the same power to seize and take such books, papers, writings, or other articles or things, being in the custody or power of the person against whom the sequestration issues, as they would have over his own property; and thereupon such articles or things so seized and taken shall be dealt with by the court as shall be just; and after such seizure it shall be lawful for the court, upon the application of the prisoner, or of any other person in the cause or matter, or upon any report to be made in pursuance of this act, to make such order for the discharge of the prisoner, upon such terms, and if it shall see fit, making any costs in the cause, as to the court shall seem proper.

Rule 17.—That in any other case of a commitment for contempt, not herein specially provided for, the court may upon any such application as last aforesaid, or upon any such report as aforesaid, make such order for the discharge of the prisoner, upon any such terms, and making, if the court shall see fit, any costs in the cause, as to the court shall seem proper.

 1843.—Beunet v. Chudleigh.

red before he commenced defending *in forma pauperis*: *Blood v. Lee*,^(a) *Jones v. Peers*,^(b) *Corbett v. Corbett*.^(c) And he urged that it would be an inconsistency in the Court, after having allowed a party to sue or defend *in forma pauperis*, to require from him payment of the previous costs.

Mr. *Piggot* for the plaintiff, cited *Davenport v. Davenport*^(d) as an authority decisive of the present question.

THE VICE-CHANCELLOR.—It appears to me, that under the general authority of this Court, independently of the stat. 11 Geo. 4 & 1 Will. 4, c. 36, or under that statute and its general authority, the Court has the power to make the order which in this case, under its very peculiar circumstances, seems to me proper, namely, that the party shall be discharged: the costs incurred by means of his contempt, and of this application being reserved, and the defendant undertaking to abide by such order as to costs and otherwise as the Court shall think fit.

[*166]

*SHERWOOD V. RIVERS.

1843: Jan. 26th.

Upon a motion for leave to enter a memorandum of service of a copy of the bill upon a defendant under the 24th of the Orders of August, 1841, it is not necessary to show by affidavit that the defendant is not an infant.

MR. SPURRIER, for the plaintiff, moved under the 24th of the Orders of August, 1841, for leave to enter a memorandum of service of a copy of the bill on one of the defendants, pursuant to the 23rd of the same Orders. The affidavit did not state that the defendant was not an infant; but upon this point

(a) 3 Wils. 24.

(b) M'Clel. and Y. 282.

(c) 16 Ves. 407.

(d) 1 Phillips, 124. See *Yorston v. Nash*, 13 Law Jour. 86. In *Davenport v. Davenport*, the argument drawn from the stat. 11 Geo. 4 and 1 Will. 4, c. 36, rule 17, was urged, but without success. That part of the argument, probably because it made no impression on the Court, is not reported.

 1843.—*Sherwood v. Rivers.*

Spurrier referred to a case mentioned in 1 *Hare*, 317, *note.*(a)

Mr. *Phillips*, *amicus curiæ*, said that the case there referred to was *Goodwin v. Bell*, in which the *Lord Chancellor* had held that it was not necessary in such cases to state by affidavit that the defendant was not an infant.

THE VICE-CHANCELLOR, upon the authority of that case, made the order as prayed.

*ADAMS V. BARRY.

[*167]

1843: Jan. 26th and 31st.

Surviving executor, who had not acted in the testator's affairs, protected from the discovery of cases and opinions stated and given on behalf of the deceased executor, who had acted; such cases and opinions having relation to a claim against the deceased executor of the same nature as the claim made against the surviving executor.

SAMUEL WILSON died in 1814, having, by his will, appointed Charles Adams and Thomas Wilson his executors, who both proved the will. Charles Adams survived Thomas Wilson, and died in 1835, having appointed several persons his executors, of whom the plaintiff alone proved his will.

Thomas Wilson died in May, 1828, having appointed Richard Harris and Mary Ann Wilson his executor and executrix, who both proved his will. In 1829, Mary Ann Wilson married the defendant, William Barry. In May, 1838, Richard Harris died, having appointed two persons of the names of Banks and Waltham his executors, who proved his will.

The bill was filed by the plaintiff as personal representative of Samuel Wilson, and on behalf of himself and all other the creditors of Thomas Wilson against Barry and his wife. After alleging that Thomas Wilson possessed assets of Samuel Wilson, that after Thomas Wilson's decease such assets came to the hands of Harris and the defendants, and that the portion of such assets received by Harris was duly accounted for

1843.—Adams v. Barry.

by his executors, and paid over by them to the defendants, the bill prayed that an account might be taken of the assets of Samuel Wilson received by Thomas Wilson, and that what might appear to be due on that account might be paid to the plaintiff as personal representative of Samuel Wilson out of Thomas Wilson's assets. The bill also prayed the usual relief in a creditors' suit against Thomas Wilson's assets.

The bill contained the usual charge, that the defendants had in their possession divers books, accounts, papers, and documents, relating to the matters aforesaid, from which, if produced, the truth of such matters would appear.

[*168] *The defendants, by their answer, stated that, except in some mere formal matters, Richard Harris alone acted in the administration of Thomas Wilson's estate, and that they the defendants were entirely ignorant, until long after the death of Harris, of there having been any claim whatever against the estate of Thomas Wilson, as executor, or otherwise, on account of the estate of Samuel Wilson; but that, after the death of Harris, the defendants, in right of the defendant, M. A. Barry, who was residuary legatee, as well as surviving executrix of Thomas Wilson, having filed their bill against the executors of Harris for an account of Thomas Wilson's estate possessed by Harris, and for payment of the residue, and that suit having been compromised upon payment of a small balance to the defendants, various papers and accounts belonging to Thomas Wilson were, thereupon, handed over by Harris's executors to the defendants. That it appeared from those papers, but that the defendants had never before been informed of the fact, that Charles Evans, as surviving executor of Samuel Wilson, very shortly after the death of Thomas Wilson, made a claim on Richard Harris for a sum alleged to have been received by Thomas Wilson, on account of the executorship of Samuel Wilson, and also required Harris to deliver up to him the papers relating to that executorship; at the same time threatening legal proceedings for enforcing his claim. The defendants then alleged that, to the best of their information and belief, the cases for the opinion of counsel, copies whereof were comprised in the schedule to the defendants' answer annexed, were prepared, and

1843.—Adams v. Barry.

the opinions thereon taken, on behalf of the said Richard Harris, as such acting executor of Thomas Wilson, as aforesaid, in the year 1828, with immediate reference to the claim then made by the said Charles Adams against the estate of the said Thomas Wilson, and to the legal proceedings which were then threatened by the said Charles Adams; and they sub- [*169] mitted that they ought not to be required to produce for the inspection of the plaintiffs, or otherwise, either the said copies of cases and opinions, or any other of the particulars mentioned in the schedule, appearing to relate thereto, or to be connected therewith.

The schedule contained the following, among other documents: Case submitted to G. R. Esq. to advise on behalf of the executors of Thomas Wilson, and opinion thereon; the rough draft of such case; paper writing purporting to contain an account of the monies claimed by the executors of Thomas Wilson to be due to them from the estate of Samuel Wilson, (made to accompany the case); further statement of case to G. R. Esq., &c., and his opinion; paper writing purporting to contain a copy of a debtor and creditor account rendered by Charles Adams to Richard Harris, between the estate of Samuel Wilson and the estate of Thomas Wilson, (made to accompany the last case.)

Mr. *Hubback*, for the plaintiff, now moved for the production of the documents mentioned in the schedule.—The cases stated for the opinion of counsel were not stated by the defendants or any one under whom the defendants claim. The present defendants were not then acting at all. The party acting was one whose representatives are not now before the Court. The estate of Samuel Wilson has been divided against itself; but no cases relating to that estate can be privileged against those who now represent the whole of it. Supposing the Court should protect the cases and opinions, there is no ground for protecting any of the other documents. As to them, no grounds of protection are laid by the answer.

Mr. *Toller*, for the defendants.

1843.—Adams v. Barry.

[*170] **THE VICE-CHANCELLOR** said, that he would, before making any order, peruse the pleadings.

Jan. 31st.—**THE VICE-CHANCELLOR** made an order protecting the defendants from the production of the documents above specified.

JONES V. BRAIN.

1843: Jan. 31st.

Upon a motion, after decree in a creditors' suit to restrain a creditor from suing the administratrix at law:—*Held*, under the circumstances, that the creditor was not entitled to the costs, either of the action or of the motion for the injunction, and that the costs of the administratrix should be costs in the cause.

THIS was a creditors' suit. A motion was now made on behalf of the defendants, Mr. and Mrs. Brain, the latter of whom was the administratrix of James Bennet, for an injunction to restrain certain creditors from taking any further proceedings at law against them.

It appeared from the affidavits that the usual decree was made against the real and personal representatives of James Bennet in the month of June, 1842; that the same had been duly carried into the Master's office, the usual advertisements had been inserted in the Gazette and in the provincial papers, and that the Master had fixed a day for making his report. It further appeared that the administratrix had received about £800 of the assets and had paid away £760, and that there were numerous debts due to the estate outstanding and real property unsold, none of which could be realized until the Master had made his report.

The writ was issued by the plaintiffs at law in December 1842. It was admitted that they were immediately on service of the writ apprised of the creditors' suit, and that a decree had been made and was in course of prosecution in the Master's office; and the affidavit of Brain and wife stated their belief that, by reason of the advertisements, the plaintiffs at law were aware of the decree before the writ was issued.

1843.—*Jones v. Brain.*

*A counter affidavit was filed by the plaintiffs at law, [*171] but no notice was taken in it of this last allegation.

Mr. *Whatley*, for the defendants, contended that they were entitled to the injunction, their affidavit showing the real state of the intestate's assets, and that they had no monies in hand which they could be called upon to pay into court: *Paxton v. Douglas*,^(a) *Jackson v. Leaf*: ^(b) and that as they have not been guilty of any default or neglect, they ought not to pay the costs of the motion. In *Drewry v. Thacker*,^(c) Lord Eldon disapproved of the practice of making an executor pay the costs of a motion of this nature as a condition precedent to his obtaining an injunction. *Currey v. Bowyer*^(d) and *Anon.*,^(e) are authorities to show that a party going on at law, after notice of the decree, is guilty of a contempt of Court, and therefore cannot be allowed the costs of the motion for an injunction.

With respect to the costs at law, as the affidavit of the defendants has not been answered on an important point, no costs should be allowed. At all events if costs be allowed, they should be added to the debt and proved against the estate: *Goate v. Fryer*.^(f)

Mr. *Godlee*, *contra*, cited *Jones v. Jones*,^(g) and contended that the plaintiff at law had a right to come to the Court to know whether it was a fit case for an injunction.

THE VICE-CHANCELLOR.—The administratrix is clearly entitled to the injunction asked. Without giving any opinion upon the general question of the costs of motions of this nature in ordinary cases, I think in this instance as the administratrix shows the real state of the intestate's *assets, and the [*172] plaintiffs at law do not deny that they had notice of the decree before their writ was issued, although the administratrix not only deposes as to her belief that such was the case, but assigns the reasons for her belief, that the plaintiff at law ought to

(a) 8 Ves. 521. (b) 1 J. & W. 231. (c) 3 Swanst. 541. (d) 3 Madd. 456.
(e) 2 S. & S. 424. (f) 2 Cox, 202; 3 Bro. C. C. 23. (g) 5 Sim. 678.

1843.—*Jones v. Brain.*

have no costs either of the action or of this motion, and that the administratrix's costs should be costs in the cause.

Injunction granted accordingly.

EDE V. KNOWLES.

1843 : Jan. 28.

Equitable mortgage established by means of written documents, coupled with parol evidence, against a prior voluntary settlement.

Parol evidence of subsequent advances made on the security of a prior equitable mortgage by deposit of deeds and memorandum in writing not under seal.

Semble, that a post-dated cheque is receivable in evidence to prove its own invalidity.

Inquiry between co-defendants.

IN and for some years previous to April, 1841, John Knowles carried on the business of silkman in London, in co-partnership with Henry Rodwell and others, under the firm of John Knowles & Co. In the course of their business, they had various dealings with Francis Ede, a merchant in Bucklersbury, who from time to time made advances of money to them on the security of silk warrants and bills of exchange, the property of the firm.

In April, 1841, the firm being indebted to Ede on the balance of such dealings in the sum of £15,000 and upwards, and being desirous of a further advance of £4000, applied to Ede to lend them that sum on the security of certain freehold property of which Knowles was seized in fee in reversion expectant on the decease of his mother. This proposal was agreed to, and Ede's solicitors were instructed to prepare a proper mortgage of the premises.

- On the 16th of the same month, and before the mortgage was prepared, Knowles and Rodwell on behalf of the firm applied to
- Ede for the loan of £1000 on account of the mortgage. That sum was accordingly advanced, and the title-deeds of the property were deposited by Knowles with Ede; a letter [*173] being at the same time written by *Knowles to the effect that the deeds were held by Ede as a collateral security for the £1000 till the mortgage was made. On the following

1843.—Ede v. Knowles.

day, the 17th of April, Knowles and Rodwell again called on Ede, and at the instance of Knowles, a further advance of £1000 was made by Ede to the firm on account of the mortgage.

On the last mentioned occasion, Knowles and Rodwell, or one of them, applied to Ede to deliver back to them some of the silk warrants of the firm which Ede then held, and in lieu thereof to take cheques of the firm to an equal amount: the amount proposed being £928. This proposition was consented to and acted upon; but upon the understanding, as Ede insisted, that the £928 should form part of the mortgage security. Knowles then wrote and delivered to Ede a letter signed by him in the name of the firm in the following terms:—

“London, 17th April, 1841.

“To Francis Ede, Esq.

“Sir,—In consideration of your delivering to us certain silk warrants against our cheques as stated below, we hereby grant you a lien upon all property of ours in your hands, including the deeds deposited with you yesterday, as a collateral security for the due payment of our cheques. The lien to cease on payment of our cheques.

J. KNOWLES & Co.”

On the 23rd April a similar transaction similarly understood by Ede took place with respect to other silk warrants to the amount of £560, except that on this occasion a letter, in terms similar to that of the 17th of April, was signed on behalf of the firm, not by Knowles but by Rodwell in the presence of Knowles.

On the 26th April, Knowles and Rodwell, on behalf of the firm, applied to Ede for a further advance of £1000, and as a security for that sum, or part of it, proposed to deposit with Ede certain silk warrants. This proposal *was [*174] accepted and carried into execution; Ede considering this advance also as being made on account of the mortgage.

A letter was at the same time written by Rodwell in the name of the firm and delivered to Ede, acknowledging the loan of the £1000, and stating that, in consideration of such loan, the firm deposited the silk warrants as a collateral security for the same, and granted Ede a general lien for the same purpose on all prop-

1843.—Ede v. Knowles.

erty of theirs in Ede's hands. On the same occasion, Knowles wrote and delivered a letter to Ede in these terms:—

“Dear Sir,—Please to request Mr. A. (Ede's solicitor) to make out the mortgage for £4000.

“Yours, JOHN KNOWLES.”

Before the mortgage could be completed, and on the 14th May, 1841, a fiat in bankruptcy issued against John Knowles & Co., under which they were declared bankrupt. At the time of the bankruptcy, none of the cheques delivered as before mentioned had been paid, except one for £159; the payment of which left the sum of £769 due on the first set of cheques. The balance due from John Knowles & Co. to Ede on the general account, including the several sums advanced in the manner before mentioned, was £19,675. And supposing Ede to be entitled to have the before mentioned advances to the extent of £4000 secured by the mortgage, it was admitted to be doubtful whether he had by means of silk warrants and bills of exchange of the firm in his hands, a sufficient security for the remaining £15,675.

Ede now brought his bill for the purpose of establishing an equitable mortgage of the premises to the extent of £4000 and interest, by virtue of the agreement for a mortgage, the deposit of title-deeds, the several letters of the 16th, 17th, 23rd, [*175] and 26th April, 1841, and the other *dealings and transactions before mentioned; praying also consequential relief. The bill alleged that the several sums of £928 and £560, for which the cheques were given, and the sum of £1000, for which, on the 26th April, the silk warrants were deposited, were expressly intended to be comprised in the mortgage security, the cheques and silk warrants being merely collateral securities.

The bill also alleged that the plaintiff had discovered since the bankruptcy, that by an indenture, dated and executed on the 15th April, 1837, which was after the marriage of Knowles, Knowles had conveyed his reversionary interest in the property, the subject of the intended mortgage, to trustees in trust for his wife for her life for her separate use, with remainder to his children. Upon that part of the case, the bill, after referring to the statutes 27 Eliz. c. 4, and 13 Eliz. c. 5, and charging that Knowles was insolvent at the date of that indenture, prayed

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that the indenture might be declared to be fraudulent and void as against the plaintiff, either as equitable mortgage of the premises or as a general creditor of John Knowles together with the other creditors.

The defendants to the bill were John Knowles, his wife, and only child, the trustees of the indenture of the 15th April, 1837, and the assignees (both creditors' and official) under the bankruptcy of John Knowles & Co.

The defendant Knowles by his answer denied that the several sums secured by the cheques and by the deposit of silk warrants on the 26th April, were ever intended to form part of the sum of £4000 agreed to be advanced on mortgage; on the contrary, he alleged that the cheques and silk warrants were intended to be a full and complete security, independent of the mortgage transaction; and though he admitted that the plaintiff was entitled to a mortgage to the extent of £2000 (the amount of the two first advances,) yet he insisted that the plaintiff was not entitled to a mortgage for more than that sum. He admitted that the deed of settlement of the 15th April, [*176] 1837, was purely voluntary, but insisted that he was solvent at the time of its execution.

The defendants, the trustees of the voluntary settlement, insisted by their answer that Knowles was solvent at the time of its execution.

The defendants, the assignees, by their answer stated that they had documents in their possession which, in their judgment, tended to show that at the date of the deed of the 15th April, 1837, Knowles was in insolvent circumstances.

The cause now came on for hearing.

In support of the plaintiff's case, the evidence of Samuel Napper, the plaintiff's clerk, and Henry Rodwell, the late partner of Knowles, who had obtained his certificate, were read.

The former witness stated that he was present at all the transactions which took place in April, 1841, between the plaintiff and the defendant Knowles and Rodwell. After deposing to the circumstances connected with the original proposal for a mortgage, he, in reference to the transactions of the 17th and 23rd April, stated that Knowles and Rodwell were both present on those

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occasions, and that the plaintiff delivered up to them the silk warrants on the distinct understanding that they should be considered as money to that amount, advanced in respect of the mortgage loan in case the cheques given against them should not be paid. With respect to the transaction of the 26th April, he stated that the plaintiff at first declined to make the proposed further advance of £1000, on the ground that he should not then have securities sufficient to cover his general balance; that he however ultimately agreed to the proposal upon the terms of the advance being made on account of the mortgage, and some additional silk warrants being deposited with him as a collateral security to cover the general loan account; that [*177] these terms were *accepted, and that Knowles at the same time observed that the plaintiff had the deeds in his possession and could pay himself, or used words to that effect. The defendant further stated that silk warrants of the estimated value of £574 were deposited with the plaintiff, in pursuance of this arrangement.

The witness, Henry Rodwell, corroborated the evidence of Napper in every material circumstance. He also stated that Knowles was, to the best of his recollection, present when all the transactions in reference to the loan of £4000 took place; or if he was not actually present when any of the advances were applied for or made, or when the silk warrants were returned, he was privy to every part of the transactions, and fully concurred in every thing that was done.

It appeared from the evidence of the last witness, that it was understood that the cheques delivered to the plaintiff were not to be presented, or used in the event of the mortgage being completed. It also appeared that the cheques which were delivered on the 17th April, were of a date subsequent to that day.

In the course of the cause, Mr. *Wigram*, for the defendants, the assignees, objected that the post-dated cheque could not be used in evidence for the plaintiffs. They were absolutely void, and could not be used in evidence for any purpose: *Serle v. Norton.*(a)

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THE VICE-CHANCELLOR said, that if, as had been contended, the cheques were mere waste paper, they were worse than dishonoured cheques, and made the case stronger for the plaintiff.

The objection was not pressed.

*Mr. *Purvis* and Mr. *Heathfield*, for the plaintiff, [*178] contended that a mortgage, to the full extent of £4000, was sufficiently proved. The sums of £928 and £560 were comprehended within the mortgage security, by means of the letters signed John Knowles & Co. coupled with the parol evidence. As to the sum of £1000 advanced on the 26th April, if John Knowles's letter of that date directing the mortgage to be made, had not the effect of bringing that sum within the mortgage security, the parol evidence would be sufficient for that purpose. An agreement by parol to make a subsequent advance on a deposit of deeds, is sufficient to constitute an equitable mortgage as to the subsequent advance: *Ex parte Kensington*; (a) *Ex parte Lloyd*. (b) As to that part of the case which relates to the voluntary settlement, the plaintiff asks, that in case he fails to any extent in realizing his mortgage security, under the stat. 27 Eliz. c. 4, he may be allowed to receive the balance, or a share of the balance, as a general creditor, under the stat. 13 Eliz. c. 6. [The Vice-Chancellor.—The plaintiff does not allege, by his bill, that he was a creditor at the time of the settlement. I apprehend, that a deed can only be set aside as fraudulent against creditors at the instance of a person who was a creditor at the time, though, when it shall have been set aside, subsequent creditors may be let in.]

Mr. *Spence* and Mr. *Berkeley*, for the defendant Knowles, contended that the parol evidence of the mortgage was excluded by the documentary. With respect to adding by means of parol evidence subsequent advances to an original mortgage, they cited *Ex parte Hooper*. (c)

Mr. *Koe* for the defendants, the trustees.

(a) 2 Ves. & B. 79.

(b) 1 Gl. & J. 389.

(c) 2 Rose, 222.

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[*179] *Mr. *Wigram*, (with whom was Mr. *Renshaw*,) for the defendants the assignees, suggested that an inquiry should be directed as to the insolvency of Knowles at the time of the execution of the settlement; in order to give the assignees the surplus of the mortgaged premises after payment of the mortgage: *Richardson v. Smallwood*.(a) He observed, however, that proof of absolute insolvency in the settlor at the time of the execution of the voluntary settlement was not necessary in order to enable the Court to set it aside: *Townsend v. Westacott*.(b)

THE VICE-CHANCELLOR, after referring, upon the question of insolvency, to the stat. 6 Geo. 4, c. 16, s. 73, expressed an inclination to grant the inquiry asked by the assignees, the counsel for the co-defendants not opposing it. His Honor, however, was of opinion, that the inquiry, if to be directed, should be postponed.

THE VICE-CHANCELLOR.—This is a very clear case as far as the plaintiff is concerned. An agreement has been distinctly proved that there should be an advance of £4000 to Mr. Knowles or to the house of which Mr. Knowles was a partner, on the security of certain reversionary property, part of the separate estate of Knowles.

On the 16th April the deeds are deposited; part of the money being then paid. Farther sums are advanced at different times between that day and the 26th of April inclusive, to an extent exceeding £4000; of which the sum of £159 only appears to have been repaid, that repayment still leaving more than £4000 due.[1]

It is said that the written documents which came into exis-

(a) Jac. 557

(b) 2 Beav. 340.

[1] For the decisions upon the question as to the creation of an equitable mortgage by deposit of title-deed, see *Ex parte Bruce*, 1 Rose, 374; *Hockley v. Bantock*, 1 Russell, 141; *Keyes v. Williams*, 3 Younge & Col. 62; *Russell v. Russell*, 1 Bro. Ch. R. 269, and Mr. Bell's note, 1; *Paine v. Smith*, 2 Mylne and K. 417; *Mandeville v. Welch*, 5 Wheaton R. 277; *Ex parte Mountford*, 14 Vesey, 606; *Ex parte Langston*, 17 Vesey, 228.

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tence from time to time in the course of executing the original agreement, preclude the parol evidence from being *received. That is not my opinion.[2] I am of opinion [*180]

[2] The meaning and object of the deposit has been allowed to be explained by parol evidence, a circumstance which has often been lamented. *Ex parte Hay*, 15 Vesey, 4; *Norris v. Wilkinson*, 12 Vesey, 197. "There is nothing," said Lord Eldon, "that requires to be watched with more jealousy than this doctrine of lien by the deposit of deeds, especially when the inference contradicts a written instrument." *Ex parte Coombe*, 17 Ves. 370. If there are false and contradictory accounts as to what was the nature of the deposit, it cannot be held to give a lien; (*Anon.* 1 Mad. Pr. 675;) but contradictory statements may be subject of inquiry. *Ex parte Mountford*, 14 Ves. 607.

In all cases where there is anything equivocal in the circumstances, the intention and object of the deposit may clearly be examined into. *Casberd v. Attorney-General*, 6 Price, 411, 459. *Lucas v. Commerford*, 3 Bro. 166.

That the doctrine of equitable mortgages has been received with disapprobation, and that Courts are disinclined to enlarge its operations, see *Norris v. Wilkinson* 12 Ves. 197; *Ex parte Kensington*, 2 V. & B. 83; *Ex parte Whitbread*, 19 Ves. 209; *Ex parte Hooper*, 19 Ves. 477; *Mountford v. Scott*, Turn. & R. 280.

The case of *Russell v. Russell*, 1 Bro. C. C. 269, is the leading case which first established these equitable liens or mortgages, and the establishment of this doctrine has been frequently lamented. See *Edge v. Worthington*, 1 Con. 212; *Ex parte Hooper*, 19 Ves. 477.

Lord Abinger, in *Keyes v. Williams*, 3 Y. & C. p. 61, has attempted to vindicate the Court of Chancery from having violated the statute of frauds. 29 Car. II., c. 3, s. 4. He says "The doctrine of equitable mortgages has been said to be an invasion of the statute of frauds, and no doubt there was great difficulty in knowing how to deal with deposit of deeds by way of security after the passing of the statute. But in my opinion, that statute was never meant to affect the transaction of a man borrowing money and depositing his title deeds as a pledge for the payment. A court of law could not avail such a party to recover back his title-deeds by an action of trover; the answer to such an action being, that the title-deeds were pledged for a sum of money, and that, till the money is repaid, the party has no right to them. So, if the party comes into equity for relief, he would be told, that before he sought equity, he must do equity by repaying the money in consideration for which the deeds had been lodged in the other parties hands. The doctrine of equitable mortgages therefore, appears to have arisen from the necessity of the case. It may, however, in many cases operate to useful purposes, and is certainly not injurious to commerce. In commercial transactions it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the title deeds and preparing the papers. Expediency, therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute."

It has been determined by a great number of authorities, that a lien on land may be obtained by a mere deposit of deeds relating to the lands, notwithstanding the sta-

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that by the parol evidence, or the written documents coupled with that parol evidence, (which clearly is receivable,) a case of equitable mortgage upon the property for £4000 proved to have been paid is established.

It appearing that sums exceeding £4000 were, between the 16th and 20th April, 1841, both inclusive, advanced by the plaintiff to John Knowles or to John Knowles & Co., at the request of John Knowles, upon an agreement for a security on the property comprised in certain deeds mentioned in the exhibit A, (the letter of the 16th April,) deposited with the plaintiff on the 16th April, declare that the plaintiff became equitable mortgagee for £4000, and interest, upon the property comprised in those deeds, and let the Master inquire what the deeds were which were so deposited on the 16th April, and what was the property therein comprised. Let him take an account of what is due for principal and interest at £5 per cent., in respect of the £4000. And it being alleged by all parties that the property comprised in the in-

tute of frauds. Whether the lien obtained by a simple deposit is, as it is generally called, an equitable mortgage, or whether it amounts only to a charge, is perhaps left in some obscurity. The questions which generally arises in such cases are, is the deposit of the deeds all that is intended to be done, or is it gathered from the act of deposit that something further—namely, a former security, such as is usually given on an advance of money, on the security of land,—is to be given? If the former only, then, according to the preponderance of authority, the deposit amounts to a simple charge, and the remedy to enforce the charge will be the same as is given in other cases where money is charged upon land—namely, by sale. If the latter, then the remedy would appear to be, first, to compel the completion of the contract, and then give the ordinary remedies which the mortgagee is entitled to.

Lord Thurlow and Sir William Grant were of the opinion that, where title-deeds were delivered by the debtor to the creditor, or to a solicitor, not specifically by way of pledge, but in order that a mortgage might be prepared, (no money passing at the time,) and before the mortgage was executed the debtor died, or became bankrupt, the transaction must be considered as incomplete, and that it did not create a lien upon the estate. *Ex parte Bulteel*, 2 Con. 243. *Norris v. Wilkinson*, 12 Ves. 192. But see *Ex parte Bruce*, 1 Rose, 374; *Edge v. Worthington*, 1 Con. 212; *Hockley v. Bantock*, 1 Russ. 141; *Keyes v. Williams*, 3 Y. & Coll. 62.

In the case last cited, Lord Abinger said—

“It has been ably argued for the defendant, that the circumstances of the deeds having been deposited, not as present security, but with a view to a future security, gives rise to a distinction between this case and others which have been decided on the general doctrine. Certainly, if before the money was advanced, the deeds had been deposited with a view to prepare a future mortgage, such transaction could not be considered as an equitable mortgage by deposit. But it is otherwise where there is a present advance, and the deeds are deposited under a promise to forbear suing, although they may be deposited only for the purpose of preparing a future mortgage. In such cases, the deeds are given in as part of the security, and become pledged from the very nature of the transaction.

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denture of settlement of the 15th April, 1837, is the same property as that comprised in the deeds deposited on the 16th April, 1841, declare such deposit effectual against the settlement. Let the decree be without prejudice to any question between the co-defendants. Take an account of all the dealings and transactions between the plaintiff and the house of John Knowles & Co., up to the time of the bankruptcy, and of all the securities held by the plaintiff, and the mode in which the same were dealt with, and what he has received in respect thereof, and what if anything is now due to the plaintiff from John Knowles & Co., distinguishing the amount secured by the deposit.

*BRIDGE V. BROWN,

[*181]

1843: Feb. 11th, 14th, and 15th.

A charge by executors for unnecessary expenses of a funeral disallowed.[1]

Charges by trustees for money laid out in luxuries, under color of maintenance, and for money unnecessarily expended in pulling down and rebuilding a house, disallowed.

Where a testator directs that the income of his estate shall be applied in maintenance, and the income is insufficient for that purpose, the Court will in some cases direct payment out of the capital of his personalty.

STEPHEN BROWN, by his will dated the 15th September, 1824, after appointing Stephen Brown and Henry Unwin to be his executors and trustees, and bequeathing the sum of £800 to his wife Ann Brown, gave and devised unto the said Stephen Brown and Henry Unwin the freehold part of his farms and lands, called respectively Borough Fields, Burr Hall, and Cheer Lays, (or the Burr-Hall estate,) situate in the parish of Sible Hedingham, in the county of Essex, or in the adjoining parishes, to hold

[1] That the estate of a deceased person is always liable for the reasonable expenses of his funeral, and can in no event be liable beyond them, see *Green v. Salter*, 3 Nev. & P. 388; *Brice v. Wilson*, 3 Nev. & M. 512. See also *Tugwell v. Heyman*, 3 Camp. 298.

That as against creditors, an executor can only be allowed for funeral expenses, what is absolutely necessary, regard being had to the degree and condition of the deceased. See *Hancock v. Portmore*, 1 B. & Adl. 260; *Edwards v. Edwards*, 4 Tyr. 438; 2 C. & M. 612. £79 was held too much, where the deceased was a captain in the army on half-pay. *Hancock v. Portmore*, 1 B. & Adl. 260. Where the deceased was a small trader, £10 was held to be a reasonable allowance, as against a creditor. *Reeves v. Ward*, 2 Scott, 390, 2 Bing. N. C. 235.

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to them the said Stephen Brown and Henry Unwin, and the survivor of them, and the executors and administrators of the survivor, In trust to carry on the business of the freehold parts of the same farms, and from time to time to apply the proceeds and profits thereof for and towards the support of his (the said testator's) wife, and the maintenance and clothing and education of his the testator's two daughters until the younger of them should attain the age of twenty-five years, if she should so long live, or in case of her death before that time, until his other daughter should attain that age. And he gave and devised all such part or parts of the before-mentioned farms as were copyhold unto and to the use of his the testator's daughter Eliza, her heirs and assigns forever, nevertheless upon trust to permit and suffer the said Stephen Brown and Henry Brown, or the survivor of them, to occupy and enjoy the said copyhold parts thereof, and receive the rents and profits thereof, in the same way and for the same purposes as he had therein before directed with respect to the freehold parts of the before-mentioned farms until the youngest of his daughters should have attained the age of twenty-five years; and when she should have so attained that age, then the said copyhold parts of the said farms should be and [*182] remain unto and to the use of his said daughter Eliza, her heirs and assigns for ever. And in case such proceeds and profits arising from the said farms should not be sufficient for the purposes before mentioned, then the said testator directed his said executors or the survivor of them, his executors and administrators, from time to time to take so much of the interest or dividends arising from his monies invested in Government or other securities as they in their discretion should think requisite, and apply the same towards such maintenance, clothing and education as aforesaid. But in case his (the testator's) said wife should not choose to live with his children or should marry again, or in case she should form any illicit connection with any person or persons whomsoever, then he directed that she should no longer remain in any of his hereditaments and premises, but should be entirely excluded and dispossessed from residing or living upon the same; and he gave and bequeathed to her in lieu of such living and maintenance as aforesaid, one clear annuity

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or yearly sum of £70, to be paid into her hands for her sole and proper use, free from the debts and control of any future husband, out of the interest or dividends arising from the money invested as aforesaid, by two equal payments in every year during the term of her natural life ; and in such case the said testator directed his said trustees to apply the said profits arising from the carrying on the said business for and towards the maintenance, education and clothing of his said children until the younger of them or (in case of her death) until the survivor should attain the age of twenty-five years ; and upon the happening of either of these events the testator gave and devised all the before-mentioned freehold and copy-hold farms, lands and hereditaments with the appurtenances unto and to the use of his said daughter Eliza, her heirs and assigns for ever, &c. And the testator also gave and devised unto his said trustees all that freehold part of his farm and lands called Page's, to hold to them, his said trustees in trust, either to carry *on the [*183] business thereof or to let the same to some other person as they should think proper, and from time to time to invest the rents, profits, and proceeds thereof on some good security until his younger daughter Sarah should attain the age of twenty-five years if she should so long live ; and he gave and devised all such part and parts of the before-mentioned farm called Page's as was copy-hold, and also those two copyhold fields called Vastly and Small Gains, and the rents and profits which should have arisen from carrying on the said business or letting the said premises unto and to the use of his said daughter Sarah, her heirs and assigns forever, nevertheless upon trust that she should permit his said trustees Stephen Brown and Henry Unwin or the survivor of them to carry on the business of the said copyhold part of the said farm called Page's together with the said fields, or to let the same for her benefit until she should arrive to the age of twenty-five years in the same manner as he had therein-before directed the freeholds of the said farm to be occupied or letten, &c. And the testator also gave and bequeathed the sum of £3170 new £4 per cent. stock, and the sum of 2167*l.* 1*s.* 7*d.* or his share or proportion thereof in the £3 per cent. consols and reduced stock then standing in the Accountant General's name

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in the Court of Chancery, together with all dividends thereon and all other his monies and securities for money, (except the sum of £800 thereinbefore bequeathed to his said wife,) unto his executors in trust after payment of his debts, funeral and testamentary expenses, to continue upon Government or real securities such monies as should be invested thereon, and to invest the residue, if any, on like securities or on some good real securities; and as soon as his daughter Sarah, or in case of her death his said daughter Eliza, should attain the age of twenty-five years, the said testator bequeathed all his monies and all interest which should have accumulated and all his personal estate of every description, unto and to be *equally divided between his said daughters Eliza and Sarah or unto the survivor, in case either should die without leaving issue, &c.

The testator died in December, 1825, leaving his widow and his two daughters, Eliza and Sarah, surviving him. Eliza married Francis Whitelock, and attained her age of twenty-five in July, 1835. Sarah married Joseph Bridge, and attained her age of twenty-five in February, 1838. In May, 1827, the widow married William Lake. He died, and in December, 1835, the widow married Richard Hanchett.

The bill was filed by Mr. and Mrs. Bridge and their infant child against Brown and Unwin, the executors of the testator, and against Whitelock and his wife. It charged various acts of improvidence and mismanagement on the part of the executors, and prayed the usual accounts of the testator's property and debts, and that the executors might be charged with the losses occasioned by them to the testator's estate.

The cause came on for hearing before His Lordship the *Master of the Rolls*, when a decree was made directing the usual accounts to be taken of the testator's personal estate, and of his debts, funeral expenses, and legacies, and also of the rents and profits of the real estates received by the defendants. And it was ordered that an account should be taken of all monies expended in the maintenance of Ann Hanchett, formerly the testator's widow and in the maintenance and education of the plaintiff Sarah Bridge, and the defendant Eliza Whitelock, the testator's

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daughters, and under what circumstances such monies had been so expended. And it was referred to the Master to inquire and state whether any and what sums were proper to be expended in repairing or rebuilding the farm-house or buildings in the farm called Page's. And it was ordered that an account should be taken of the produce and profits of the farming business carried on by the *defendants, the executors, on the farms [*185] mentioned in the bill. And the Master was to be at liberty to state special circumstances, &c. The Master having made his report in pursuance of this decree, the defendants, the executors took various exceptions to that report; which exceptions now came on for argument.

Mr. *Lee* and Mr. *Heathfield*, for the exceptions.

Mr. *Russell* and Mr. *Wigram*, for the report.

The Master having by his report stated generally that he had allowed the executors £100 for funeral expenses, an exception was taken to his report on the ground that he ought to have allowed for those expenses £145, the charge brought in by the defendants. It appeared that a sum of £20 for a tombstone was included in the defendants' charge. On the other hand, there was a charge of £35 for mourning for the testator's widow and daughters.

It appeared from the report and from other sources, that the value of the Burr-Hall estate was about £6000, that of Pages about £1500, and that of the testator's personalty, after payment of his debts, about £4000. All the testator's debts and legacies were paid.

In support of the exception *Stagg v. Punter*(a) was cited, with a view to show that considering the extent of the testator's estate, as apparent on the face of the will, the sum of £145 was not an unreasonable expenditure for the funeral.

The counsel for the exceptants also proposed to read *the affidavit of the defendant Unwin (which had been [*186]

(a) 3 Atk. 119.

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used in the Master's office,) for the purpose of verifying the payments which had been made, and of showing that they were reasonable.

The counsel for the plaintiff objected to the production of this affidavit as evidence, though it might be admissible as laying a foundation for the claim: *Trotter v. Trotter*.^(a)

This distinction appeared to be acceded to on the other side.

THE VICE-CHANCELLOR, after expressing a doubt whether the mourning of the widow and daughters might not be allowed either (as suggested by the exceptions) as maintenance, or on the ground taken in *Paice v. Archbishop of Canterbury*,^(b) said that upon the whole his impression was that he could not allow the claim of the defendants. His Honor however postponed his final decision on the point.

With reference to the inquiries which had been directed concerning the maintenance of the widow and daughters, the Master found specially as follows:—That the testator for some time previous and down to the time of his death resided with his family at the farm-house called Burr Hall; that after his decease his widow continued to reside there with her daughters until Midsummer, 1826; that at Midsummer, 1826, the widow, or the defendants Brown and Unwin at her request, hired a house in Sible Hedingham called High House at the annual rent of £25; that the furniture in such house, or the greater part of it, was purchased by the defendants Brown and Unwin out of the testator's estate; that the widow removed to High House [*187] at Midsummer, 1826, and that she continued to reside there with her daughters Eliza and Sarah Brown until the 22nd of May, 1827, when she married William Lake of Halstead, where she then went to reside; that Eliza and Sarah Brown continued to reside at High House after the marriage of their mother until Michaelmas, 1827, when that house was

(a) 5 Sim. 383; see 19 Ves. 196.

(b) 14 Ves. 364.

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given up, and the furniture, or the greater part of it, was sold ; that while High House was occupied by the widow and her daughters, Burr Hall was inhabited by the bailiff, but that no taxes were paid for it ; and that the several sums of money paid and expended by the defendants Brown and Unwin in and about the removal of the widow and her daughters to and their occupation of High House amounted in the whole to the sum of 79*l.* 13*s.* 3*d.* exclusive of the sums paid by them for rates and taxes for such house.

The reason given in the defendant's state of facts for the removal to High House was, that Burr Hall was lonely, and liable to depredations. This assertion, however, was denied on the other side.

With respect to the education of the daughter, the Master found that the testator had a governess residing in his family at a salary of twenty-five guineas *per annum*, and that he also employed music and drawing masters to attend and instruct them ; that after the death of the testator, the defendants, the executors, continued to provide governesses and masters in the same manner as the testator had done ; that from Michaelmas, 1827, to February, 1830, the daughters were placed under the tuition of a Mr. Gray, a dissenting minister, at the rate, first of £100 and then of £120 *per annum* : and that in February, 1830, they went to reside at Burr Hall, and continued to do so till their respective marriages.

The Master further found that the defendants the executors purchased out of the testator's estate and *main- [*188] tained a four-wheeled poney-carriage and a poney for the use of the widow and her daughters during their residence at High House, and a gig and ponies for the use of the daughters after High House was given up.

The Master then, after stating that the defendants the executors had from time to time advanced out of the testator's estate various sums of money for the support and maintenance of the widow and children until their respective marriages, certified that upon consideration of the several matters aforesaid &c. he was of opinion that the several sums so paid and expended by the defendants in the purchase of furniture and on removing to

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and incident to the occupation of High House, and also the several sums expended by them in the purchase of the said carriages and ponies, had been improperly paid and expended by them, and ought not to be allowed to them, and he had therefore, proceeded to take an account of all the monies which had been paid and expended by the defendants the executors in the maintenance of the widow and in the maintenance and education of the daughters, exclusive of the several sums of money so improperly paid and expended. And he found that the defendants the executors had paid and expended in such maintenance and education, under the circumstances before stated, the several sums of money mentioned in the fourth schedule to his report, amounting in the whole to the sum of £1265, but inasmuch as the amount so expended considerably exceeded the income arising from the testator's estate applicable to the maintenance and education of the widow and daughters, he submitted to the judgment of the Court whether the defendants were to be allowed, in respect of the payments so made by them, any and what sum beyond the income of the testator's estate applicable to such maintenance and education.

Exceptions were taken to this part of the report on [*189] the *ground that the Master ought to have allowed the expenditure incurred in the living and occupation of High House, and the purchase of the poney and chaise. Those exceptions, however, were overruled.

As to the Master's suggestions respecting the possible application of the capital of the testator's personalty to the discharge of the sums paid for maintenance and education, the counsel for the exceptants cited *Ex parte Chambers*.(a)

THE VICE-CHANCELLOR said, that if he could be satisfied that the sum which the Master had allowed was not more than sufficient for the decent, proper, and respectable maintenance of this family, he should probably be of opinion that a part of the capital of the testator's personalty might properly be applied

(a) 1 Russ. & M. 577.

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in the discharge of that sum. His Honor, however, reserved the point.

In answer to the inquiries which had been directed respecting the farm called Page's, the Master reported that such farm contained about 75 acres of the annual value of from £60 to £75, or thereabouts; that there were on the farm a farm-house and buildings which had been repaired by the testator about two years before his death; and that at the death of the testator, the said farm-house and buildings were generally in good tenantable repair, and that very few repairs were actually required or proper to be done thereto.

The Master further found that in the month of April, 1826, shortly after the death of the testator, the defendants the executors agreed to let the farm call Page's to Mr. James Norris at the yearly rent of £75; and that *thereupon [*190] an agreement in writing, dated the 11th April, 1826, was entered into between the defendants and Norris, whereby Norris agreed to hire the farm called Page's and all the messuage or tenement, lands, hereditaments, and premises at the yearly rent of £75 for the term of eleven years to commence from Michaelmas, 1826, upon certain conditions therein mentioned; and that, amongst other things, Norris thereby agreed to leave the same in good tenantable repair upon being found with rough materials for the same; that J. Norris entered on the premises as occupier thereof at Michaelmas, 1826, pursuant to the agreement; that the defendants the executors, but at what time the Master had not been able satisfactorily to ascertain, determined to add two new rooms to the farm-house and to make some alterations in the barn attached thereto, and that estimates were thereupon made of the costs of such additions and alterations; that the defendants proceeded to carry the proposed plan into execution, and caused one end of the house to be pulled down for the purpose of making the proposed addition, when, as it was alleged, it was found impracticable to complete the proposed addition, and it became necessary to pull down the house; that the defendants thereupon caused the farm-house to be pulled down and a new farm-house to be built, and expended, as it was

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alleged, upon such building, and in various alterations and work in and to the said barn, various sums amounting in the whole to the sum of 782*l.* 8*s.* 2*d.* And the Master found, by the evidence laid before him on behalf of the plaintiffs, that the new farm-house was altogether of a different size and character from the former house, and was a much larger house than was adapted to or suitable for the farm, and was beyond the means of any tenant who would be likely to take the farm, regard being had to the quantity and quality of the land; and that any such tenant would find it inconvenient to furnish or pay

[*191] *the rates and taxes of such a house. And he also found that the new house was in a bye part of the country and was approached by narrow lanes, and was unsuited for a residence of any person not connected with the said farm, and that there was little probability of the same being let for a residence; and further, that the annual value of the farm had not been increased by the erection of such new house, and that it was, in fact, an incumbrance to the property.

The Master then, after referring to the respective states of facts laid before him on the part of the plaintiffs and the defendants the executors, certified that he had not thought fit to allow the claim of the defendants, so far as the same related to the several sums expended by them in altering and rebuilding the farm-house. But he was of opinion that the several sums expended by them in repairing and altering the barn and farm buildings, and in repairing the farm-house previously to its being taken down, were properly expended: and having taken an account thereof, he found that the several sums so expended amounted together to the sum of 216*l.* 18*s.*

On the argument to the exception to this part of the report, the respective parties read various conflicting affidavits of builders and surveyors as to the necessity of the course taken by the executors.

THE VICE-CHANCELLOR.—The substantial question is whether the sum of £565 and a fraction for rebuilding the house, or any part of it, is to be allowed. In the present case, even if there were any reasonable chance of finding a fund which, under any

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circumstances, might be made available for the payment of it, this is not an expenditure that it is possible to allow.

The house that originally stood on this property appears to have been a small old cottage, which probably *was [*192] in bad repair, but which might at a reasonable expense have been made fit for the reception and comfortable dwelling of a farm labourer. The evidence, as to the probability of letting it, merely amounts to this—that it could not have been let to a farmer with a view to his living in it. There is no evidence of any endeavour to let it to a farmer, or any person, who might have had a homestead of his own and kept a farming bailiff. The evidence is, (or at least there is no evidence to the contrary,) that this might have been done well, and with facility. Considering what the whole property is worth to be let, it does not appear to me that the estate has gained anything by what has been done. The exception must be overruled.[2]

His Honour added that an allowance must be made to the executors for the value of the timber &c. of the old house, if it should appear that such an allowance had not already been made to them; but with this exception all that could be allowed to the executors was 216*l.* 18*s.*, the sum mentioned by the Master.

[2] See *Hatton v. Weems*, 12 Gill & J. 85; *Pritchard v. Hicks*, 1 Paige, 270. That executors and administrators ought to be allowed in their accounts all reasonable proper disbursements for the benefit of the estate they represent, see *Nimmo's Ex. v. Commonwealth*, 4 Hen. & M. 57; *Carroll v. Connell*, 2 J. J. Marsh. 205.

For cases which hold that where a trustee acts bona fide and with due diligence, they are viewed with favor and are protected in Courts of Equity, and their acts regarded with indulgent consideration; but where they have betrayed their trust, or have been guilty of unreasonable negligence, they forfeit all claim to the favor and protection of the court, and are dealt with according to the rules of strict, if not rigorous justice, see *Hunter v. Bryant*, 2 Wheat. 32; *Diffenderfer v. Winder*, 3 Gill & J. 311; *Johnston's Estate*, 9 Watt's R. 108; *Chase v. Lockerman*, 11 Gill & J. 185; *Hatton v. Weems*, 12 Gill & J. 85; *Moses et al. v. Murgatroyd*, 1 John. Ch. R. 473; *Pritchard v. Hicks, et al.* 1 Paige, 270; *Thompson v. Brown*, 4 John. Ch. R. 619; *Long's Estate*, 6 Watts, 46; *Case v. Abeel*, 1 Paige Ch. R. 393; *Hart v. Ten Eyck*, 2 John. Ch. R. 108; *Dillebough's Estate*, 4 Watts, 177; *Davel v. Eden*, 3 Desau. 245; *Osgood v. Franklin*, 2 John. Ch. R. 1; *King v. King*, 3 John. Ch. R. 552; *Wakeman v. Hazelton*, 3 Barbour Ch. R. 143; *Clark v. Clark*, 8 Paige R. 152; *Orcutt v. Orms*, 3 Paige, 459.

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Feb. 15th.—THE VICE-CHANCELLOR.—I have considered the question as to the funeral, with a wish if possible to allow the executors something more than the Master has done, but I cannot see my way clearly to differ from him. After attending as far as reason would allow to the wishes of the family, and to all the demands of decency and propriety, not forgetting the matter of the tombstone, I cannot arrive at the conclusion that the Master is wrong; I must see that he is wrong before I differ from him.

The next question is as to the maintenance; and upon that I am clearly of opinion that the whole of the sum of [*193] £1265 must be allowed, and payment of it obtained in some manner out of the testator's estate. Let it be declared that the first fund for payment is the income of the Burr-Hall farm. The next fund is the income of the personal estate. Supposing those two funds not to be sufficient for the payment of this sum, I consider myself authorized by the language of the will and the authorities to resort to the income of Page's farm for the purpose of supplying it. But as resorting to the income of Page's farm would be to take away a fund to which in the events that have happened one sister has become entitled exclusively of the other, the right course to avoid circuitry, and which I think may also be done consistently with principle and authority, the circumstances appearing to the Court to require it, will be, to take what the income of the Burr-Hall farm and the income of the personalty will not provide from the capital of the personalty, in which both sisters are equally interested.

 FOSTER V. SMITH.

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Testator devised and bequeathed his freehold and leasehold estates to trustees, upon trust to receive the rents and profits thereof when and as the same should become due and payable, and thereout to pay to his wife, if she should survive him, an annuity of £200 during the term of her life, to be paid by four equal quarterly payments &c., and from and immediately after the decease of his said wife, upon trust that the trustees should convey and assure the said freehold and leasehold premises unto his the testator's three sisters as tenants in common, their heirs, executors, and assigns. The rents and profits being insufficient for the payment of the annu-

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ity, *held*, that the arrears due at the widow's death were chargeable on the corpus of the estates.[1]

JOHN BLOOMFIELD, by his will dated the 1st January, 1823. gave, devised and bequeathed all that his freehold estate at Chelmsford, and all those his leasehold messuages or tenements and premises situate at Walworth, Kensington, and in the City of London, with the appurtenances thereto respectively belonging, unto Thomas Smith and Thomas Reynolds and the survivor of them, and the heirs, executors and administrators of such survivor according to the nature and quality of the said estates, upon the trusts following: *that is to say, [*194] upon trust to receive the rents, issues and profits of all and singular his said freehold and leasehold estates, when and as the same should become due and payable, and thereout to pay unto his said wife if she should survive him one clear annuity or annual sum of £200 of lawful money of Great Britain for and during the term of her natural life, to and for her own sole and separate use, and not to be subject to the debts, control, or engagements of any future husband she might intermarry with, and her receipts alone, notwithstanding her coverture, to be good and effectual discharges to his said trustees for the same, the said annuity to be paid by four equal quarterly payments in the year, that is to say, on Lady Day, Midsummer Day, Michaelmas Day, and Christmas Day, without any deduction or abatement whatsoever for or by reason of any present or future taxes, charges or impositions, the first quarterly payment to be made on each of the said days as should happen next after his decease: and from and immediately after the decease of his said wife, then upon this further trust that they his said trustees, or the survivor of them, or the heirs of such survivors, should convey and assure in due form of law all that his said freehold estate with the appurtenances thereto belonging, unto and to the use of his sisters Rose Pottel, Elizabeth Tubby, and Sarah Lillystone, their heirs and assigns forever, as tenants in common and not as joint tenants; and upon this further trust, as to his said leasehold estates, that, upon and immediately after

[1] See same case, 1 Phillips R. 663, and the note to that case. *Reversed*, 1 Phillips, 629; 8 B. 198.

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the decease of his said wife, they his said trustees or the survivor of them or the executors or administrators of such survivor should assign, transfer and set over unto his said three sisters, their executors, administrators and assigns, all and singular, his said leasehold premises with their appurtenances, to hold to them, their executors, administrators, and assigns for all the residue of

the said term of years which then might be to come and [*195] *unexpired therein, in equal shares and proportions, share and share alike, and upon and for no other use, trust, intent or purpose whatsoever. And as to all the rest, residue and remainder of his estate and effects whatsoever and wheresoever whereof he might die seized, possessed or entitled unto, the said testator gave, devised, and bequeathed the same and every part thereof unto his said three sisters, their heirs, executors, administrators and assigns, absolutely and for ever, equally to be divided between them, share and share alike ; and he thereby nominated, constituted and appointed his said wife and the said Thomas Smith and Thomas Reynolds executrix and executors of his said will.

The testator died in January, 1823, leaving his widow surviving him. The rents of the estates were for some years sufficient to pay the annuity, but latterly they were not. They were, however, after they had become insufficient, regularly applied in discharge of the annuity, as far as they would go, until February 1839. In the following July the widow died, and at her death a sum of £466 was due in respect of the arrears of the annuity.

The bill was filed by the executors of the widow against the trustees under the testator's will and the parties interested in the testator's freehold and leasehold estates, for the purpose of determining the question whether the sum of £466 was chargeable on the *corpus* of those estates.

Mr. *Anderdon* and Mr. *Sergeant*, for the plaintiffs, cited *Sheffield v. Earl of Coventry*,^(a) *Bootle v. Blundell*,^(b) *Allan v. Backhouse*,^(c) and the following passage from *Story's Equity Jurisprudence*:—"When a testator directs a gross sum to be

(a) 2 Russ. & M. 317.

(b) 1 Mer. 233.

(c) 2 Ves. & B. 65.

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raised out of the rents and profits of an estate at a fixed time, or for a definite purpose or object, which must be accomplished within a short period of time, or which cannot be delayed beyond a reasonable time, it is *but fair to presume [*196] that he intends that the gross sum shall at all events be raised, so that the end may be punctually accomplished; and that he acts under the impression that it may be so obtained by a due application of the rents and profits within the intermediate period. But the rents and profits are but the means; and the question therefore may properly be put, whether the means, if totally inadequate to accomplish the end, are to control the end, or are to yield to it. Now, if the gross sum cannot be raised out of the rents and profits at all, or not so soon as to meet the exigency contemplated by the testator, it would seem but a reasonable interpretation of his intention to presume that he meant to dispense with the means, and at all events to require the sum to be raised. The same principle is applied by Courts of Equity in other analogous cases.”(a)

Mr. *Chandless*, for the defendants, the trustees.

Mr. *Wigram*, and Mr. *Toller*, for the defendants, the devisees. We do not contest that the plaintiffs are entitled to be paid out of the whole of the income of the property which accrued in the lifetime of the widow; but we submit that the testator intended to charge the estates only during her lifetime, and not to charge the fee. The trustees are directed to convey the estates to the sisters “from and immediately after the decease” of the widow. In none of the cases has the Court gone farther than to charge the particular estate named: *Boyd v. Buckle*,(b) *Davies v. Wattier*,(c) *May v. Bennett*,(d) *Arundell v. Arundell*,(e) *Hodge v. Lewin*,(f) *Swallow v. Swallow*,(g) *Kendall v. Russell*.(h)

*THE VICE CHANCELLOR.—I am of opinion that [*197] here is an intention expressed on the face of this will

(a) Stor. Eq. Jur. Vol. 2, ch. 29, sect. 1064 a.

(c) 1 Sim. & St. 463.

(f) 1 Beav. 431.

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(d) 1 Russ. 360.

(g) Id. 423 n.

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(b) 10 Sim. 595.

(e) 1 Myl. & K. 316.

(h) 3 Sim. 424.

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that the widow shall have £200 a-year out of these estates. The testator gives the whole of the freehold and leasehold estates absolutely to the trustees upon trust to receive, not the rents, issues, and profits accruing from them during the life or widowhood only of his wife, but "the rents, issues, and profits of all and singular his said freehold and leasehold estates, when and as the same should become due and payable, and thereout to pay unto his said wife one clear annuity or annual sum of £200, for and during the term of her natural life &c., to be paid by four quarterly payments in the year, that is to say. &c. without any deduction or abatement whatsoever, for or by reason of any present or future taxes, charges or impositions, the first quarterly payment to be made on each of the said days as should happen next after his decease." Now, if the will had stopped there, whether the words "rents, issues, and profits," are to be considered annual, or howsoever derived from the land, the case would have been the same. If the annuity had not been paid in the widow's lifetime, the trustees would have continued to pay it out of the annual rents; and that would be a charge on the estate. The question is, whether the subsequent words cut down that general expression of intention; and this depends on the meaning of the words "from and immediately after the decease of my said wife." My impression is, that the effect of those words is not to cut down the right which the previous expression had given, but that the sense and meaning intended to be conveyed by them is—"subject to the annuity"—the intention being that, subject to the annuity given to the wife, the property was to go over.

There is a degree of analogy between this case and some others, which are familiar. Thus, in cases where, in the event of all the children of a testator dying under twenty-one, [*198] the "property is given over, and no child is born—the having a child has been held not to be a condition essential to the bequest over; or as Sir *William Grant* expressed it, in the case of *Murray v. Jones*,^(a) "the testatrix was not here prescribing substantive conditions, in the proper sense of the

(a) 2 Ves. & B. 313.

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word, on which the original devises should depend ; but was specifying events, in which the former limitation would fail ; and an opening would be made for that, which was to be substituted in its place."

Again in *Jones v. Westcomb*,^(a) as Sir William Grant observes, the specified failure was by the death of the supposed child under twenty-one ; the actual failure was by the non-existence of any such child. It was held that the limitation over depended on the failure of that which preceded it, and that the testatrix had not taken in all the modes by which it might fail.

I do not say that the analogy of these cases to the present is very close in regard to their circumstances, but the principle of construction adopted in them is much the same as that which I apprehend ought to be adopted here. Another case, altogether different in its facts from the present, seems to throw light on the question ; I mean *Bullock v. Thomas*.^(b) It is not necessary to detail the particular circumstances of that case, but the *Vice-Chancellor of England* says this : "Mrs. Schenck, meaning to make a division of the fund into two parts, has not used the same language in disposing of one part of it, as she has in disposing of the other part. The language of the latter gift is not correlative to that of the former. But it is plain that she intended that her husband should have £150 a year arising from the interest of a portion of the fund, and that the sum which Mrs. Bullock was to take, should be *that portion of the whole [*199. fund out of which the £150 was to be payable. Having given that, all the rest was to go to Mr. John Rowlls Brown. But after having given a certain part of the fund, she has, by a plain blunder in language, so given the remainder as if she meant to trench on that part which she had before given."

Upon the whole, I think, though the language of the will is inaccurate, that the testator did not mean that any part of the annuity should fail, and consequently that what is due in respect of it, is a charge on the *corpus* of the estate.[2]

(a) 1 Eq. Ca. Abr. 245 ; pl. 10.

(b) 9 Sim. 634.

[2] If the prevailing interest appears to be that the estate should be secured entire to those to whom it is given in succession, the corpus will be preserved. This principle was adopted in *Phillips v. Phillips*, 8 Beav. 193.

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MELLAND V. GRAY.

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Bond and mortgage given by an only son to his father held under the circumstances of the case to be a running security for advances actually made, and not a security for the precise amount expressed in the instruments. And there being no evidence against the son as to the amount of the actual advances, he was charged in that respect to the extent of his admissions only.

WILLIAM MELLAND, by his bond dated the 15th November, 1802, in which he was described as William Melland, of Sabine Hay in the parish of Youlgreave, in the county of Derby, gentleman, became bound to his father Stephen Melland in the penal sum of £1690; the condition of the security being the payment by the obligor, his heirs, &c. to the obligee, his executors, administrators, and assigns of the sum of £845, with interest at £5 per cent. on the 15th day of May then next ensuing.

By a bond dated the 30th December, 1803, not referring in any manner to the previous bond, William Melland, therein described as of Winchelsea, in the county of Sussex, an ensign in the 14th regiment of foot, became bound in the same manner to his father in the sum of £2400, with a condition for making void the security on the payment of the full sum of £1200, with in-

In that case a testator devised his real estate to trustees in fee on trust "out of the rents, issues, and profits," to pay certain life annuities, and by sale or mortgage to raise money for payment of his debts, &c., and then to settle the estates, to the use that the annuitants shall receive out of the same premises, with power of distress and entry, and subject thereto, to one for life with remainder over. Lord Langdale, M. R., held that the annuitants were not entitled to be paid the arrears out of the *corpus*, though the rents were insufficient to keep down all the incumbrances. That in this case there were a succession of parties interested in the estate, who, during their enjoyment, were bound to keep down the annuities, and, for anything to the contrary, they might have received rents sufficient to keep them down, and also to pay the arrears. If the duty of the tenant for life were duly performed, the party entitled to the estate in remainder, would, when the estate came into possession, take the property discharged of all charges. See *French v. Morgan*, 2 Molloy, 488; *Maully v. Hawkins*, 1 Dru. & W. 363; *Goodwin v. Jeffrey*, 1 Dru. & W. 375; *Kelly v. Dawson*, 2 Molloy, 87. This case of *Foster v. Smith* was not cited in *Philips v. Philips*.

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terest at £5 per cent on the 30th of June ; which would be in the year 1804.

By an indenture of mortgage bearing even date with the last-mentioned bond, and made between William *Melland, described as of Winchelsea, in the county of [*200] Sussex, an ensign in the 14th regiment of foot, only son and heir apparent, and one of the four surviving children of Stephen Melland, by Ann his wife, deceased, of the one part, and the said Stephen Melland of the other part, reciting that the said William Melland, by his bond bearing even date with the indenture, but executed before the date thereof, was and stood bound to the said Stephen Melland, his executors, administrators, and assigns in the penal sum of £2400, conditioned to be void on payment by the said William Melland of £1200, with interest at £5 per cent. at the time and in manner in the said condition mentioned ; and further reciting the marriage settlement of the said Stephen Melland with his late wife Ann, bearing date the 27th of February, 1771, whereby certain real estates, hereditaments, and premises were conveyed to trustees in trust after the marriage, for the use of the said Stephen Melland and his wife during their joint lives and the life of the survivor, with remainder to all and every the children of the marriage equally as tenants in common and their assigns : it was witnessed, that in consideration of the sum of £1200 in hand well and truly paid by the said Stephen Melland, at or before the delivery of the said bond and of those presents, to the said William Melland, which he the said William Melland did thereby acknowledge and release, and for the better securing the repayment of the said sum of £1200 and interest according to the condition of the said bond and the proviso thereafter contained, he the said William Melland granted, released, and confirmed to the said Stephen Melland all that undivided fourth-part of the capital messuage or mansion-house of Brampton, and of the several lands, hereditaments, and premises in the said indenture of release mentioned and described, to hold to him the said Stephen Melland, his heirs and assigns, to his and their use for ever, subject nevertheless to a proviso or *condition for re- [*201] demption of the said premises upon payment by the said

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William Melland, his heirs, executors, administrators, and assigns of the said sum of £1200 on the 30th day of June then next ensuing, with interest thereon at £5 per cent. to the said Stephen Melland, his executors, administrators, and assigns.

No explanation or statement was given in any of these instruments as to the time or manner in which William Melland became indebted as therein stated. The mortgage deed contained none of the usual mortgage covenants, except the covenant for further assurance. No receipt for the consideration money was indorsed upon it.

At the death of Stephen Melland, which took place in 1820, the two bonds and mortgage deed were found uncanceled among his papers. It did not appear from any memorandum or note upon any of the instruments, that any interest had been paid upon either of the securities; nor in fact was any memorandum of any description found relating to them.

By his will dated the 21st of March, 1820, Stephen Melland devised all his real estate to William Melland for life, with remainder to his, the testator's, grandson in fee. And he gave and bequeathed all his ready money in the funds securities for money, consisting of *mortgages, bonds*, (he having other mortgages and bonds besides those which have been mentioned,) notes, book and other debts, and all other his personal estate, unto John Gray and Samuel Bridden, their executors, administrators, and assigns, upon trust that they or the survivor of them should call in and convert into ready money all such parts of his personal estate as did not consist of money, and place the same out upon freehold and other good securities, at interest, as therein mentioned, for the benefit of the testator's four children (including William) and their issue, in equal shares. And he appointed Gray and Bridden his executors.

[*202] *The testator died soon after the date of his will. Both the executors proved the will and realized the personal estate, except the sums mentioned in the bond. In order to discharge those sums with interest, the executors claimed the right to retain William Melland's share of the income of the testator's personalty, to which he was entitled under the will.

In 1832 William Melland filed his bill against Gray the sur-

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viving executor, and against the other children of the testator and their issue, praying, amongst other things, that the bonds and mortgage might be delivered up to be cancelled, and that Gray might account for what was due in respect to the plaintiff's share of the testator's personal estate.

The case, as represented by the plaintiff, was in substance this:—That in the year 1802 he was desirous of entering into the army, and accordingly his father advanced him a sum of £845 to aid him in the purchase of a cornetcy in a cavalry regiment; that he afterwards sold out, and purchased an ensigncy in the 14th regiment of foot, and it being supposed that that regiment was going abroad it was agreed that in the event of the plaintiff's death in his father's lifetime his father should have some control over the plaintiff's interest under the settlement for the money so advanced; that accordingly the plaintiff executed to his father the bond of the 15th November 1802 for securing the payment of the said sum of £845 and interest; that towards the end of the following year the plaintiff had an opportunity of purchasing a lieutenancy in another regiment, and that to enable him to make the purchase his father advanced him a further sum of £200 as an outfit and for the difference between the value of the ensigncy and lieutenancy; that the purchase was made, and in order that the plaintiff's father, in the event of the plaintiff's death in his lifetime, might have a control over his interest in the settled estates, the plaintiff executed the bond and mortgage of the 30th December 1803; that as the [*203] two sums of £845 and £200 so advanced to the plaintiff, amounted together to the sum of £1045, and as it was anticipated that the plaintiff might have occasion for further assistance, his father proposed that the security should be given to the amount of £1200, and that accordingly such last-mentioned bond and mortgage were made to secure that amount; that the last-mentioned bond and mortgage were, however, given for one and the same sum only, namely, the sum of £1200 and interest, and that such £1200 included the sum of £485, the amount of the first-mentioned bond, and the £200 so advanced as aforesaid; that no advance beyond the said two sums of £845 and £200, making together the sum of £1045, were ever

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subsequently or at any time made to or for the use of the plaintiff by his father for or on account of the said securities or any of them; that no claim or demand was ever made upon or against the plaintiff by his father during his lifetime in respect of the before-mentioned securities or any of them; that the plaintiff never paid any sum in respect of principal or interest on such securities; that his father for many years previous to his death made him an annual allowance, and also, frequently stated that he did not consider the plaintiff liable on the securities; and that it was not his the father's intention that the plaintiff should be charged with or be indebted under the said securities or any of them, in the event of his surviving his father.

The defendants, by their answer, disputed the truth of the plaintiff's case. They did not however, nor did the plaintiff, read any evidence at the hearing of the cause. By the decree made at the hearing of the cause in June, 1837, it was referred to the Master to inquire under what circumstances the bonds and mortgage in the pleadings mentioned were given, and to state all other circumstances specially relating thereto, and what, if anything, under such circumstances was then due.

In pursuance of this decree the Master proceeded to [*204] *prepare his report, and in doing so, thought fit to receive the plaintiff's affidavit as evidence in support of his case; the Master considering such affidavit receivable in evidence, as being supported by the view of the securities themselves, and the depositions of the plaintiff's witnesses.

Two witnesses were examined before the Master for the plaintiff. They were not cross-examined by the defendants. One of them, Mrs. Bowman, stated that she had long been on terms of friendship with the plaintiff's father and had known the plaintiff since he was a boy; that she had frequently conversed with the plaintiff's father on his family matters, and particularly respecting his son; that in such conversations the father frequently spoke to her about an advance of money to his son William Melland, for which he said he had taken a bond or bonds and mortgage; that the deponent understood that these were given him by his son for advances of money; that she could not set forth the particulars of such conversations verbally,

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but that, as near as she could remember them, they were to the effect that William Melland was extravagant, and that he the father had taken a bond or bonds and mortgage as securities, which would enable him to come in as a creditor in case of necessity; that from such conversations the deponent understood that the father did not mean either the principal or the interest to come against his said son, but under circumstances of embarrassment; and that he wished to leave his Brompton estate clear to his said son, and made offers to other parts of his family who had charges upon it to make arrangements for that purpose, but was prevented so doing from the unwillingness of some of them.

The other witness for the plaintiff, Mrs. Brown, deposed to certain declarations of Samuel Bridden, the deceased executor of the testator, to the effect that the securities were not intended to be enforced against the plaintiff if he survived his father.

Upon the foundation of this evidence, and adverting to the frame of the securities and to the particular circumstances *connected with them, which have been already stated, [*205] the Master reported that nothing was due on the securities or any of them.

To this report the defendants took several exceptions, which after argument before the *Vice-Chancellor of England* were allowed.(a)

The Master then made his report, reviewing his former report, and thereby, after stating the death of the plaintiff since his last report, and referring to the same evidence as had been used by him on the former occasion, and after mentioning that no further evidence had been brought before him, stated that he considered the bonds and mortgage as being together a security for the money actually advanced by the testator to his son; and after stating for special circumstances that no part of the principal or interest mentioned in the securities had ever been paid or demanded in the father's lifetime, and that no memorandum of them (unless the testator's will were a memorandum) was found at the testator's death, and after noticing that the amount advan-

(a) See 5 Jurist, 1004.

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ced had been admitted by the son in his affidavit to be £1045, and that the son had deposed that no further advance was made to him, he the Master found the said sum of £1045, to be due and owing from the estate of the late plaintiff William Melland to the estate of the testator Stephen Melland upon the said bonds and indenture of mortgage as subsisting securities, but that they were not intended to be enforced against the plaintiff during his father's life; and he therefore computed interest upon the sum of £1045 from the 30th day of March 1820, the day of the decease of the testator; and he found that such interest, calculated at the rate of £5 per cent. per annum to the 8th day of December, 1842, the day of the date of that his report, amounting to 1181*l.* 4*s.*, and being added to the said principal money, they made together for principal money and interest the sum of 2226*l.* 4*s.*

[*206] *To this report several exceptions were taken by the defendant Gray, the main ground of exception being that the Master ought to have found that the whole of the several principal sums expressed as the respective considerations on the face of the several instruments, with interest thereon respectively from the date of each instrument, were due and owing from the estate of the late plaintiff to the estate of the testator.

Mr. *Wigram* and Mr. *Hubback*, for the exceptions, contended that the evidence before the Master, supposing it to be all admissible, was too slight to warrant the conclusion to which he had come, but that the affidavit of the plaintiff was not admissible in evidence in his own favor: *Fladong v. Winter.*(a) [*The Vice-Chancellor*—No doubt the affidavit cannot be regarded as evidence for the plaintiff.] Then, putting aside the plaintiff's affidavit, what evidence is there that these securities are not available to the utmost amount mentioned in them? Assuming that the £1200 bond may possibly include the amount secured by the former bond, there is no ground for contending that it is a security for any thing less than £1200 and interest from the date of it. The words "at or before" contained in the mortgage deed imply a past, and not a future consideration.

(a) 19 Ves. 196.

1843.—*Melland v. Gray.*

Mr. *Kenyon Parker* and Mr. *Faber*, for the report.

Mr. *James Parker* and Mr. *Benedict Chapman*, for defendants not opposing the report, observed that there was no recital in the mortgage deed of the £1200 having been *advanced*; the recital amounted only to the recital of a bond.

Mr. *Jeremy*, for the other defendants, opposed the report.

*In the course of the argument *The Vice-Chancellor* [*207] referred to *Flower v. Marten*,^(a) and remarked upon the peculiar frame of the mortgage deed. At the close of the argument, he asked the counsel for the defendant Gray, whether they would take an issue; which they declined.

THE VICE-CHANCELLOR.—I stopped the counsel for the expectant in their argument upon the admissibility of the plaintiff's affidavit as evidence for himself, being satisfied that it could not be so received, but that the case must be considered independently of that affidavit.

The conclusion to which I have come is, that this would possibly be a fit case for an issue, if it were asked. I say this, remembering a precedent before the Court of Exchequer; where, upon the death of an elderly lady possessed of a security, a question arose whether the security should be enforced against a near relative of the lady, I think her grandson. The Court of Exchequer directed an issue, which in substance was, whether it was her intention that the security should be enforced; and it also directed that the relative who claimed that the security should not be enforced should be examined before the jury himself: and he was examined. Supposing, however, an issue not to be asked, there appears to me, under all the circumstances, sufficient evidence to support the plaintiff's case.

Looking at the position in which the father stood towards his only son, a young man just entering the army and requiring a provision—looking at the character of the securities, and the many observations which occur with reference to the frame of the mortgage deed, perhaps answered in some degree by Mr.

(a) 2 Myl. & C. 459.

 1843.—*Melland v. Gray.*

Wigram, but still important when coupled with this, that the father lived more than fifteen years after the latter [*208] security, and there is no evidence *of any demand made upon either security or of any interest having been paid or demanded, the son having been wholly during that time maintained by the father—the probability, and I think I may say the fair inference, is, that the bond for £1200 was rather meant as a running security, than as an absolute bond for that amount; and if it were taken as a running security, the excepting party, having no evidence of the advances made, could only prove the advances by means of the plaintiff's affidavit, which if used against him would also be evidence in his favor. Considering these circumstances, and the necessity that existed for making some allowance to the son, and looking also at the evidence of the ladies, particularly that of Mrs. Bowman, the case is brought round to the Master's conclusion, that the sums of £845 and £200 only, with interest from the testator's death, are now due on these securities. Therefore taking these views, but not being disposed to make such an order as would seem to recognize the use of the affidavit as evidence for the plaintiff, the order which I make is this:—

WITHOUT allowing or overruling either of the exceptions, declare upon them that, under all the circumstances of the case as appearing upon the evidence, the principal sums of £845 and £200, and interest thereon from the testator's death, are the whole amount due upon the mortgage. Return the deposit. Let the costs of all parties upon the exceptions be costs in the cause.

[*209]

*OLDHAM V. HUBBARD.

1843: March 16th and 20th.

A rector, who took a composition for his tithes every Michaelmas, died in January, 1841. The new rector was collated in the following April, and before harvest time he employed a surveyor to value the tithes. The surveyor furnished him with a report, stating what he considered ought yearly to be paid by each of the occupiers, as a composition in lieu of tithes. In August, the new rector required the respective occupiers to pay him as a compensation for their tithes the amount mentioned by the surveyor. The occupiers accordingly in November, 1841, made their payments according to the surveyor's report, for the whole year from Michael-

 1843.—Oldham v. Hubbard.

mas 1840 to Michaelmas, 1841:—*Held*, that the representative of the late rector was entitled to be paid by the new rector a proportion, according to the time which elapsed from Michaelmas 1840 to the late rector's death, of the composition which existed in the late rector's lifetime.

Semble, that a composition for tithes is within the statutes 11 Geo. 2, c. 19, s. 15, and 4 Will. 4, c. 22.

JOHN OLDHAM, deceased, formerly rector of Standon and Aythorpe in the county of Essex, entered into a yearly composition with the occupiers in those parishes for all tithes of the rectory. He also in consideration of a yearly rent demised the glebe lands. The composition and rent were payable at Michaelmas in every year, and the last which he received were paid to him in Michaelmas, 1840. He died on the 31st January, 1841, having by his will appointed the plaintiff his executor.

In April, 1841, the defendant was collated to and inducted into the rectories of Standon and Aythorpe.

The bill after stating these facts alleged that soon after Michaelmas, 1841, the defendant received from the occupiers of land in the said parishes a composition for the whole of the tithes, and also the whole of the rent which had accrued due from Michaelmas, 1840, to Michaelmas, 1841, and that he had paid over to the plaintiff as the personal representative of Oldham the proportion of the rent which had accrued from Michaelmas, 1840, to the time of Oldham's death, but that he had refused to pay the plaintiff the proportion of the composition which he had received for the tithes which had accrued during that period. The bill, after charging that no fresh agreement had been entered into between the defendant and the occupiers, but that all the tenants and occupiers had paid the defendant various sums as and for a composition for the whole year from Michaelmas 1840, and that upon a proper apportionment being made a large sum would be found due to the plaintiff in respect thereof, prayed an account of all sums received *by the defendant by way of com- [*210] position as before mentioned, that it might be declared that the plaintiff as such representative as aforesaid was entitled to a proportion of such composition in respect of the time which elapsed between Michaelmas, 1840, and Oldham's death, and that such proportion might be paid to the plaintiff.

1843.—Oldham v. Hubbard

The defendant by his answer admitted that soon after Michaelmas, 1841, namely, in November of that year, he received from the occupiers within the parishes Standon and Aythorpe various sums of money as money payments or compositions in respect of the tithes and titheable matters within those parishes, and the whole of the rent of the glebe lands which had accrued due from Michaelmas, 1840, to Michaelmas, 1841, and that he paid over to the plaintiff as personal representative of John Oldham, the proportion of the rent of the glebe lands which had accrued from Michaelmas, 1840, to the death of the testator. He admitted that he had refused to pay to the plaintiff the proportions of the money payments and compositions which he received from the said tithes and titheable matters and which had accrued during such period as aforesaid, and that he still refused to pay such proportions thereof as required by the plaintiff, for the reason hereinafter stated. He admitted that the tenants and occupiers of the lands in the parishes of Standon and Aythorpe had paid to him various sums of money as a composition or satisfaction for the whole year from Michaelmas, 1840, to Michaelmas, 1841, but he denied that, upon a proper apportionment being made, a large sum would be found due and owing to the plaintiff in respect thereof, because he the defendant had been advised, and submitted to the judgment of the Court, that he was only accountable to the plaintiff as such representative as aforesaid for such portion of the said compositions or payments as the value of the tithes or titheable matters in the said rectories, if paid in kind, accruing between Michaelmas, 1840, when the last [*211] composition was *received by or payable to John Oldham, and the period of the death of John Oldham would have amounted to; and not rateably, according to the time which had elapsed between his death and the last payment: and he submitted that, in consequence of the period of the year at which the testator died, he would have been entitled to a very small amount of tithes in kind, if any, between Michaelmas, 1840, and the time of his death if he had taken the same in kind; and that he the defendant was therefore liable to pay the plaintiff as such representative a very small, if any, sum of money as a

 1843.—*Odham v. Hubbard*.

satisfaction in respect of the tithes which accrued due to the testator between Michaelmas, 1841, and his death.

The defendant further stated that when he was inducted into the rectories he was dissatisfied with the amount of the composition which had been received by the testator, and he therefore employed Mr. Corfield, a surveyor of experience, to survey the titheable lands within the rectories, and to value the tithes of such lands; that the surveyor did this before the harvest of 1841, and furnished the defendant with a report stating the amount which he considered ought yearly to be paid by each of the occupiers of such lands as a composition in lieu of tithes; that the amounts so stated varied materially from the amounts which had been received for such composition by the testator; that the defendant did not, previously to Michaelmas 1841, enter into any agreements with the occupiers for the payment of such compositions, but that in the month of August, 1841, when the occupiers were liable to set out the tithes in kind, he wrote to each of them a letter requiring them to pay to him, as a compensation or satisfaction for the tithes which they were respectively liable to set out in kind, the amount or very near the amount which the surveyor had reported to him ought to be paid by such occupiers respectively, and that the occupiers, with one or two exceptions, attended at the tithe audit in *November, 1841, [*212] and then or soon afterwards paid the sums which had been so required of them. He admitted that all the payments made by the tenants and occupiers of the said lands to him had been made for the whole year from Michaelmas 1840 to Michaelmas 1841; that no fresh agreement had been entered into between the tenants and occupiers and himself previous to Michaelmas, 1841; and that all sums paid to him were received by him in lieu and full satisfaction of all the tithe and titheable matters and things accruing due between Michaelmas 1840 and Michaelmas 1841.

Mr. *Simpkinson* and Mr. *Tillotson* for the plaintiff relied on *Paget v. Gee*,(a) *Hawkins v. Kelly*,(b) and *Aynesley v. Words-*

(a) *Ambl.* 198; *Burn's Just. tit. Distress*.

(b) 8 *Ves.* 308.

 1843.—Oldham v. Hubbard.

worth,(a) as decisive of the question in this cause. They also referred to the statutes 11 Geo. 2, c. 19, s. 15,(b) and 4 Will. 4, c. 22.(c)

[*213] *Mr. *Malins* for the defendant.—The defendant did not adopt the composition of the former rector, nor previously to Michaelmas, 1841, did he enter into any new composition. His right at Michaelmas, 1841, was a right to tithes in kind, and the right to tithes in kind being a right to take the fruits of the land and not a money payment, neither the language of the statutes nor the doctrine of Lord *Hardwicke* in *Paget v. Gee* or of Lord *Eldon* in *Hawkins v. Kelly* is applicable. The

(a) 2 Ves. & B. 331.

(b) Whereby it is enacted that “where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under tenant or under tenants of such lands, tenements, and hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent according to the time such tenant for life lived of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively.”

(c) By the second section it is enacted, that “all rents service reserved on any lease, by a tenant in fee or for any life interest, or by any lease granted under any power, (and which leases shall have been granted after the passing of this act,) and all rents charge, and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the united kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, (as the case may be,) including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions, and other payments being made,” &c.

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case of *Aynesley v. Wordsworth* was decided by Sir *Thomas Plumer* on the express ground that it had no reference to tithes in kind throughout the year, but that the defendant having adopted the contract of his predecessor for an uniform money payment, that contract was still in force. [The *Vice-Chancellor*.—Sir *Thomas Plumer* seems to have assumed that a composition for tithes was not within the statute.] In the view which he took of the case it was not perhaps necessary to determine that question. He however states that to be his opinion, and it seems clear that a composition for tithes is not a demise or lease within the statute. The legislature appears to have adopted that view; for the stat. 6 & 7 Will. 4, c. 71, s. 86, expressly enacts that the stat. 4 Will. 4, c. 22, (enlarging that of Geo. 2,) shall extend to rent charges to be granted in lieu of tithes; an enactment which would have been scarcely necessary had a composition for tithes been *apportionable. If the plaintiff is entitled [*214] to anything, it must be for the value of the tithes in kind between the time of the last payment of the composition to the late rector and the time of his death: *Williams v. Powell*.(a) Speaking of that case Sir *Thomas Plumer* says that the representative clearly could not be entitled to a participation of the new composition subsequent to the death. That observation applies strongly to the present case. *Ex parte Smyth*.(b)

Mr. *Simpkinson* in reply.—*Aynesley v. Wordsworth* establishes that time, and not the nature of the produce taken during the time, is to be the measure of apportionment. It must be admitted that according to modern practice, a composition for tithes has been considered as not within the statute of Geo. 2. But that opinion rests on no solid foundation, and the reasons for it no where appear. *Meeley v. Webber*,(c) *Talbot v. Salmon*.(d)

March 20th.—THE VICE-CHANCELLOR.—The plaintiff in this cause sues as executor of the late rector of certain parishes in Essex, who is admitted to have died on the 31st of January, 1841, and was in April of that year succeeded in the livings by the defendant. The subject of litigation is the payment to be

(a) 10 East, 269. (b) 1 Swanst. 337. (c) 2 Eq. Ca. Abr. 704. (d) Ibid.
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made in respect of the tithe from Michaelmas 1840 to the late rector's death. It is not made a question whether the plaintiff is entitled to recover anything in this respect from the defendant, who admits that the plaintiff is entitled to recover something. The question argued has been one of *quantum*, but also certainly one of principle. The form and manner in which it arises may be collected from these passages in the answer. [His Honour here read the material passages of the answer as before stated.]

[*215] *The defendant's counsel has not, as I understood the argument, questioned the soundness of the decision in *Aynsley v. Wordsworth*, but has contended that, under the circumstances stated in the answer, that case is not, and the case of *Williams v. Powell* is, applicable to the present: the plaintiff, on the other hand, asserting that the principles on which *Aynsley v. Wordsworth* was decided were correct and applicable to this cause, and, if so, conclusive in his favor; demanding as he does a share, apportioned according to time, of all the compositions extending over the period from Michaelmas, 1840, to Michaelmas, 1841, which have been received by the defendant, who insist that the measure of apportionment or of payment to the plaintiff is the value of the actual tithes in kind which accrued between Michaelmas, 1840, and the late rector's death.

The plaintiff admits that if the defendant had not received anything in respect of any tithe anterior to that event—had not meddled with any tithe or right prior to the commencement of his own title, he would not have been liable to the plaintiff for anything; but the plaintiff may be represented as insisting that the defendant having taken upon himself to deal with the tithe from Michaelmas, 1840, to the late testator's death, having compounded and received a pecuniary composition for that tithe, has in effect so far undertaken an agency for the plaintiff, of which the plaintiff is entitled to make an adoption and claim the benefit. In this, whether as between the plaintiff and the occupiers, the statute of Geo. 2, or the statute 4 & 5 Will. 4, c. 22, is or might have been applicable to the case or not—whether by any means or to any extent he has or had any remedy against the occupiers or not, he seems to me well founded. The occupiers

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may well have thought themselves bound morally to pay or render to the plaintiff something for the period in question—may well have thought it an arguable question, at least, whether legally or equitably, under one of the statutes or otherwise, there were not compellable *to do so, and may be reasonably supposed to have dealt with the defendant on the footing that there was a claim for tithe or composition or an apportionment of composition in respect of that time, which was a claim deserving attention and consideration both morally and in point of law or equity. [*216]

It is, on the whole, impossible not to treat that claim and that period as material ingredients in the arrangement and composition as to the tithes from Michaelmas, 1840, to Michaelmas, 1841, which the defendant made.

It is impossible to say whether an agreement with any of the occupiers for any part of the time previous to Michaelmas, 1841, would or could have been made upon the principle of excluding the time previous to the late rector's death.

Now the arrangement or composition thus made by the defendant in or after August, 1841, was as to time single and entire; that is, there was not any severance or distinction in respect of the time previous, or in respect of the time subsequent to the 31st of January, in that year. The whole demand for the entire year, from Michaelmas to Michaelmas, was blended and fused together. There does not appear to have been any valuation or estimate for the months of October, November, December, and January, or any part of that period distinctly, either as to the years 1840 and 1841, or either of them, or any other year or years; nor again, does Mr. Corfield's valuation or the defendant's arrangement proceeding upon it, appear to have been made with any specific or particular reference to the actual produce of the year commencing at Michaelmas, 1840, or any part of it. The valuation and arrangement seem to have been of a general nature, as right *communibus annis*; intended not for that year only but for a continuance, until determined or varied by some new agreement or arrangement. The expression in the answer is "the amount which he considered ought yearly to be *paid [*217] by each of the occupiers." Now, under these circum-

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stances, treating all question of right and remedy, as well as of account, between the plaintiff and the occupiers, as precluded by the act of the defendant, which the plaintiff has exercised his right of adopting, what tenable ground is there for holding that the plaintiff is to claim nothing but the actual value (to be ascertained in such, if any, manner as possible) of the tithes in kind which actually accrued between Michaelmas, 1840, and his testator's death? To come to that conclusion would, I apprehend, be to say what I do not understand the answer as asserting or suggesting, that such was the basis of the agreement and arrangement between the defendant and the occupiers. Why is that to be said? Again, to come to that conclusion would in substance be to decide, both that, independently of the two statutes, the late rector's composition was not apportionable, and also that neither statute extended to the case between the plaintiff and the occupiers under composition with the late rector. But I am not prepared to say that such a decision would be clearly right. I am aware of what is said in *Aynsley v. Wordsworth* by a Judge to whom very great respect is most justly due on all subjects—a Judge particularly well versed in the law of tithes. I am aware of the expressions used by Lord *Eldon* in *Hawkins v. Kelly*. I am aware that a general impression appears to have existed in accordance with the *dictum* of Sir *T. Plumer*, to which I have just referred. I am aware therefore that, to say the least, I ought greatly to doubt, notwithstanding the mischiefs against which the statutes were directed, the case of *Whitfield v. Pindar* (a), and that of *Paget v. Gee* (especially as reported by Mr. *Swanston*, (b)) whether the plaintiff would, but for his adoption of the defendant's bargain, have been entitled to recover from the

[*218] occupiers under composition with the late rector a proportion of the composition, calculated according to time, from Michaelmas, 1840, to 31st January, 1841. But I may say upon this point that I think it fairly arguable. The language of the 15th section of the stat. 11 Geo. 2, c. 16, and of the 1st section of the stat. 4 & 5 Will. 4, c. 22, is "lands, tenements, or hereditaments." The defendant's counsel does not deny that an

(a) 2 Bro. C. C. 662, cited 8 Ves. 311.

(b) 1 Swanst. 347, n.

1843.—*Oldham v. Hubbard*.

incorporeal tenement may be within the acts, or that a demise by the tenant for life of the tithes of an estate, occupied by A. B., to C. D., would be within it. He has contended however (whether rightly or erroneously I need not and I do not say,) that had such a tenant for life, instead of so demising the tithes, compounded for them with A. B. by way of annual pecuniary composition, that could not be held to be a demise or lease within a true construction of the two sections. Is this question, not mooted by the occupiers, to be now mooted between the plaintiff and the defendant, to the possible prejudice of the former? The two statutes do not nor does that later stat. of Will. 4, to which the defendant's counsel referred me, recognise any principle of apportionment based upon the difference in productiveness of different seasons of the year. Time alone is what they regard; and upon the whole case, whether considered with or without reference to those statutes or either of them, I am of opinion that there is not any sound or safe principle or criterion of apportionment here, except time; which must, I think, give the rule. The plaintiff, however, admitting that it would be to his disadvantage to take the mere value of the tithes themselves, which accrued before his testator's death, could not have claimed more against the occupiers than a proportion, according to time, of the compositions which existed in the late rector's time—if so much. The rate of composition to which they have agreed with the defendant is admitted at the Bar to have been in no instance lower, and in most, if not all, instances, higher than the former. But I am of opinion that justice will be *satisfied [*219] by restricting the plaintiff to a participation, according to time, in a rate of composition equal only to that which existed in his testator's lifetime. This, however, I think, ought not to make any difference in the costs. No such point has been in dispute. The defendant's contention has been merely one in which according to my judgment he entirely fails, and he must therefore pay the costs to this time.

There must be an account on the principle that I have stated, and I reserve subsequent costs.

1843.—Waters v. Bailey.

WATERS V. BAILEY.

1843: March 7th.

A., under a voluntary settlement, of which it did not appear that she had notice, was entitled to certain leaseholds, held for lives, for the term of her life, with remainder to B. Under a subsequent voluntary settlement she took a life interest in the same leaseholds, with an absolute power of appointment over the residue of the leasehold interest. While in possession of the property she took a renewed lease of it, and died, having appointed all her interest to C.:—*Held*, that the renewal enured to the benefit of B.

By an indenture of lease of the 20th November, 1777, a cottage and about four acres of land were demised and leased to George Godfrey and his heirs for the lives of Samuel Evans, Samuel Evans his son, and Elizabeth Evans his daughter, and the longest liver of them, at the rent therein mentioned; and by an indenture of the 21st May, 1783, Samuel Evans the father being then dead, the life of George Brain was substituted; the property being demised for the term of ninety-nine years expectant on the decease of Samuel Evans, the son, and Elizabeth Evans, and determinable on the decease of George Brain.

These leasehold premises were on the 2nd March, 1791, vested in Thomas Waters, who had some time in or about the year 1780 married, for his second wife, Elizabeth Willis. By his former wife he had two sons, Francis and William, the plaintiff's in this cause.

By an indenture dated the 2nd March, 1791, and made between Thomas Waters of the one part, and the plaintiff's of the other part, Thomas Waters in consideration of the natural love and affection which he had and bore unto the plaintiffs, gave, granted, and assigned unto the plaintiffs, their respective [*220] executors, administrators, and assigns the *property demised by the before-mentioned indentures, with the appurtenances, and all benefit and advantage of renewal thereof, to hold the same unto the plaintiffs, their respective executors, administrators, and assigns, from and immediately after the deaths of the said Thomas Waters and Elizabeth Waters his wife, share and share alike, for and during his term and interest therein.

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By an indenture dated the 20th December, 1796, and made between Thomas Waters and Elizabeth his wife of the one part, and Robert Willis and Thomas Fox of the other part, reciting the indentures of lease of 1777 and 1783, and that the premises had become vested in Thomas Waters for the residue of the terms, and also reciting that, the property having been purchased by Thomas Waters with the money which he received on his marriage with the said Elizabeth his wife, he had proposed and agreed, in order to make some provision for her, to settle and assure the same in manner hereinafter expressed; it was witnessed that, in pursuance of the said agreement, and for the considerations thereinbefore expressed, and for the nominal consideration therein mentioned, the said Thomas Waters assigned the said premises and all the estate, right, title, and interest, term or terms of years yet to come and unexpired, property, claim and demand whatsoever both at law and in equity of him the said Thomas Waters, to hold the same unto the said Robert Willis and Thomas Fox, their heirs, executors, administrators, and assigns, for all the residue of the said several terms of years, determinable as aforesaid, upon the trusts hereinafter mentioned, that is to say, in trust for the said Thomas Waters for so many years of said respective terms of years as he should live, and after his decease in trust for the benefit of the said Elizabeth Waters (his wife) and her assigns during so many years of the said respective terms as should expire in her lifetime, provided she should so long remain the widow of the said Thomas Waters, in full compensation and bar of all dower and thirds at common law which she might claim out of any hereditaments whereof the said Thomas Waters was or might be seised for any estate of inheritance; and from and immediately after the decease of the said Elizabeth Waters, in case she should be then unmarried and should die within the said respective terms or either of them, then upon trust for such person and persons, use and uses, estate and estates, and subject to such provisoes, limitations, and agreements as the said Elizabeth Waters, notwithstanding her then present coverture, and whether sole or covert, should, by any deed or deeds, writing or writings,

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to be executed as therein mentioned and attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils in writing thereto, or by any writing purporting to be, or in the nature of, her last will and testament, or codicil, by her duly executed in the presence of and attested by the like number of witnesses, give, direct, limit or appoint the same; and in default of appointment, upon the further trusts therein mentioned.

Thomas Waters died in August, 1805, possessed of the leasehold premises, leaving his wife and the plaintiffs surviving him, and having, by his will dated in September 1803, appointed the plaintiffs his executors.

Upon the death of Thomas Waters, Elizabeth Waters, the widow, entered into possession of the property; and in 1811, there being in existence only one of the lives nominated by the indenture of 1783, namely, that of George Brain, she, in consideration of a fine of £75, obtained from the reversioner in fee a renewal lease of the premises, which accordingly, by an indenture of the 28th September, 1811, were demised to her and her executors, administrators, and assigns, for a term of ninety-nine years expectant on the preceding terms, and determinable on the decease of William Willis.

Elizabeth Waters died in March, 1825, having by her [*222] will dated the 2nd November, 1824, duly executed *according to the power contained in the indenture of the 20th December, 1796, given all her estate, term, and interest in the premises to the defendant Elizabeth, the wife of the other defendant Charles Bailey, whom she also appointed her executrix.

On the death of Elizabeth Waters, the plaintiffs took possession of the property. In May, 1835, George Brain died, and in 1840, the remaining *cestui que vie*, Willis, being still alive, the defendants brought an action of ejectment against the plaintiffs to recover possession of the premises. These proceedings led to the present suit, in which the plaintiffs submitted that, on the death of George Brain, they became entitled to the benefit of the renewed lease of the 28th December, 1811, and claimed to have the same assigned to them on payment of the whole or such portion of the fine of £75 as the court might direct.

1843.—*Waters v. Bailey*.

It appeared from the evidence in the cause that the will of Elizabeth Waters was drawn up and written by the plaintiff Francis Waters; and that, though he knew of the deed of the 2nd March 1791, he made no mention of it to her. Whether she had notice of it from any other source did not appear. The deed of 1791 was produced by the plaintiffs at a meeting of the friends of Elizabeth Waters which took place after her decease.

Mr. *Wigram* and Mr. *Piggott*, for the plaintiffs, observed, that, both the settlements being voluntary, the first must prevail; and that, though the conduct of the plaintiff Francis in drawing the will of Elizabeth Waters without reminding her of the deed of 1791 might be wrong, it could not affect his equity. The renewal by the tenant for life must enure for the benefit of those in remainder under the first settlement: *Sanders on Uses*, vol. 1, p. 335. The deed of 1796 contained a remarkable recital; but looking to the date of the marriage, and the situation of the parties, the truth of it was highly improbable.

*Mr. *Russell*, and Mr. *Wood*, for the defendants. [*223] Where several persons hold leasehold property by a common title, and are cognisant of each other's rights, there if one obtains a renewal of the lease, it shall enure for the benefit of all. But no case has gone the length of deciding that that doctrine applies to a person in the situation of this widow. She had no knowledge of any title of any other person, but on the contrary acted under an instrument which gave her an absolute power over the property; the title under that power being acquiesced in by the plaintiffs, one of whom actually penned the instrument of appointment. What resemblance has such a case to a renewal by a party having only a life interest? In *Lee v. Lord Vernon*,^(a) a similar attempt was made to carry the general principle of equity in these cases to an inordinate length. There, the respondent having obtained a renewal independently of the other party, an attempt was made to fasten a trust upon him; but it failed for want of privity between the parties. Lord *Thurlow*, who argued that case, said—"Courts of equity

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will not declare a trust where from the nature of the transaction there does not exist any. But the claim of the respondent to the lease of 1775, was from the beginning directly adverse to and inconsistent with the right of renewal claimed by the appellant. The respondent never acted or pretended to act in any degree of trust for the appellant, but obtained the lease in question professedly as a stranger to the applicant, and for his own benefit." It is said in the present case that the second settlement was voluntary. It does not however appear that the testator may not have died seised of lands of which the wife was dowable. Besides, neither of the settlements passed the freehold lease to the wife. [The Vice-Chancellor.—Might not the deed of 1791 operate as a covenant to stand seised?]

—The defendants' counsel [*224] also referred to *Bacon's Abridgement, Leases*, (U) *Nesbitt v. Tredennick*, (a) *Owen v. Williams*. (b)

The defendants' counsel declined, in answer to a suggestion of the Court, to take an inquiry as to the circumstances under which the deed of 1791, was executed.

THE VICE-CHANCELLOR.—The defendants having declined to take an inquiry as to the deed of 1791, there is nothing substantial in their case. I must assume that that deed was fairly and regularly executed; it is a deed which, though voluntarily, settled the property effectually at law, and therefore in equity, either upon Thomas Waters and his wife for their lives and the life of the survivor of them, or upon Thomas Waters for the lives of himself and his wife and the survivor of them, and, so subject, upon the sons. By this deed an interest having passed at law, and no power of revocation having been reserved, it could not be defeated by a subsequent voluntary instrument.

The father afterwards executed another apparently voluntary deed, not contended to be otherwise than it appears to be, by which he settled the property upon himself and his wife for their joint lives and the life of the survivor (which if not done by the original deed he had a right to do,) declaring the settlement on

(a) 1 Ball & B. 29.

(b) Amb^l 734.

 1843.—*Waters v. Bailey.*

the wife to be in bar of her dower, and going on to create other interests, and giving a power to the wife of appointment by will. Now it is contended that, as this deed professed to give her an interest or a power essentially independent of the instrument of 1791, the renewal is to be considered upon principles different from those usually applied in such cases. If I were so to decide, I should be departing from general rules. As far as the interests under the deed of 1791 were concerned, she was tenant for life only, and being so, she *used the means given [*225] her by that position and obtained a renewal. It is impossible not to hold that she obtained that renewal in trust for those who were entitled under the deed of 1791.[1] Acquiescence by the plaintiffs in the claim of the defendants there is none, because Mrs. Waters held by a good title, which the plaintiffs could not dispute until her death, and, after that, they enjoyed by their own title.

[1] That equity prohibits a purchase by parties placed in a situation of trust and confidence, with respect to the subject of the purchase, see *Holt v. Holt*, 1 Chy. Cas. 190; *Greenlaw v. King*, 5 Lon. Jurist, 18; *Van Epps v. Van Epps*, 9 Paige, 237; *Torrey v. The Bank of Orleans*, 9 Paige, 649; *Tanner v. Elworthy*, 4 Beavan, 487; *Giddings v. Giddings*, 3 Russell, 24; *Dickenson and Wife v. Codwise*, 1 Sand. Ch. R. 226; *Richardson v. Jones*, 3 Gill & J. 163; *Haddix v. Haddix*, 5 Litt. 202; *Davis v. Simpson*, 1 Har. & John. 147; *The State v. Reed*, 4 Har. & M'Hen. 6; *Dorsey v. Dorsey*, 3 Har. & John. 410; *Brackenbridge v. Holland*, 2 Blackf. 377; *Case v. Abeel*, 1 Paige, 399; *Decator v. Le Ray de Chamont*, 3 Paige, 178; *Devoe v. Fanning*, 2 John. Ch. 256; *M'Clenahan v. Chambers*, 1 Mon. 44; *Ringgold v. Ringgold*, 1 Har. & Gill, 11; *Van Horn v. Fonda*, 5 John. Ch. 409; *Evertson v. Tappan*, 5 John. Ch. 514; *Hawley v. Cramer*, 4 Cowen R. 718; *Howell v. Parker*, 4 John. Ch. 118; *Ex parte Hughes*, 6 Vesey, 617; *Ex parte James*, 6 Vesey, 337; *Hall v. Hallett*, 1 Cox. 134; *Howell v. Ransom*, 11 Paige, 538; *Slade v. Van Vechten*, 11 Paige, 21; *Floyde v. Massie*, 4 Bibb, 430; *Gillett v. Peppercorne*, 3 Beavan, 78.

That this rule of equity is not limited in its application to a particular class of persons, such as trustees, guardians, or solicitors, but that it is one of universal application, affecting all persons who come within its principle, which is, that no party can be permitted to purchase an interest, where he had a duty to perform, which is inconsistent with his character as purchaser. See *Greenlaw v. King*, 5 Lon. Jurist, 18; *Van Epps v. Van Epps*, 2 Paige R. 237; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Tanner v. Elworthy*, 4 Beavan, 489; *Giddings v. Giddings*, 3 Russell, 241; *Dickinson and Wife v. Codwise*, 1 Sand. Ch. R. 226; *Gillett v. Peppercorne*, 3 Beavan, 78.

1843.—Tanner v. Tebbutt.

It is said that one of the present plaintiffs wrote her will. That fact, if coupled with other circumstances, might be material ; but standing alone, as it does, it amounts to nothing.

THE defendants, not asking any inquiry as to the deed of 1791, declare that the renewed lease was held upon the trusts of the deed of 1791. Order an injunction to restrain proceedings at law. Let the plaintiffs pay to the defendants the amount of the fine of 1811, with interest at £4 per centum to be verified by affidavit. Thereupon decree an assignment of the renewed lease to the plaintiffs, the deed of assignment to be settled by the Master if the parties differ.

TANNER V. TEBBUTT.

1843: March 7th.

Testatrix devised an estate to the three daughters of L., or such of them as should be living at her decease, and the issue of such as should be dead leaving issue, and their respective heirs, as tenants in common ; but upon the express condition that the said daughters, or such of them as should be living at the decease of the testatrix, or their issue, should, within seven years after her decease, personally appear before her executors, and deliver to them a testimonial of their or his identity ; and in default thereof the estate was devised over. Upon the death of the testatrix, E. was the party entitled under the devise to the daughters of L., and their issue. E., however, being too aged and infirm to appear before the executors, one of them and the agent of the other attended her at her house, and received from her satisfactory proofs of her identity :—*Held*, that the condition annexed to the devise to the daughters of L. and their issue, was performed.

Quære, whether it was or was not a condition subsequent ?

A TESTATRIX of the name of Linney, by her will dated 3rd March, 1840, gave and devised all those her messuages or dwelling-houses, lands and hereditaments, situate in a certain place called Whittle Field in Manchester, unto the three daughters of her late uncle James Linney, deceased, or such of them [*226] as should be living at her decease, and to the issue of such of them as should be then dead leaving issue, equally, share and share alike, as tenants in common, and to their several and respective heirs, executors, administrators and assigns, such issue nevertheless to take the part and share only which his, her, or their parent or parents would, if living, have

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been entitled to ; yet nevertheless upon the express condition that the said daughters of her said late uncle James Linney, or such of them as should be living at her decease, or their issue, should, within seven years next after her decease, personally appear before her executors, or the survivor of them, his executors or administrators, and deliver to them or him a testimonial of their or his identity ; and in default thereof, or in case the daughters of her said late uncle James Linney should be all dead at the time of her decease, without leaving lawful issue, the testatrix gave the said hereditaments and premises unto her trustees, upon trust to make an absolute sale thereof, and to pay the money arising by such sale to the persons therein named. And the testatrix appointed Robert Tebbutt and William Pass executors and trustees of her will.

The testatrix died soon after the date of the will, which was duly proved by the executors.

It appeared that James Linney, the uncle of the testatrix, had three daughters, two of whom died without issue in the lifetime of the testatrix. The remaining daughter Elizabeth was living at the death of the testatrix in obscure lodgings in Speldhurst-street, London. She was very aged and infirm, and from the time of the death of the testatrix until her own death, was for the most part confined to her bed from illness, and quite unable to undertake a journey.

One of the executors, Tebbutt, lived in Manchester ; the other at Altringham in Cheshire. In July, 1840, the solicitor of Elizabeth Linney, having collected the proper proofs of her identity, requested the executors to go to *London at her [*227] expense, for the purpose of seeing her. Pass being then unwell, an arrangement was made by the executors that Tebbutt and Shelmerdine, a partner in business with Pass should undertake the business. Tebbutt and Shelmerdine accordingly went to London in August, saw and conversed with Elizabeth Linney, received from her various proofs of her being one of the persons mentioned in the will, and made inquiries of various persons in her presence on the same point, and received satisfactory answers.

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In October, Elizabeth Linney died, having by her will devised the property in question to the plaintiff in fee.

The bill was filed against Tebbutt and Pass, and the parties entitled under the will adversely to the plaintiff, praying that it might be declared that the plaintiff in right of Elizabeth Linney was entitled to the fee-simple of the property, and for the delivery up of the title deeds and an account of rents, &c.

The cause now coming on for hearing, it was agreed between the parties that it should be decided by the *Vice-Chancellor*, without sending a case for the opinion of a court of law. The principal question was, whether what had passed between Elizabeth Linney and the executors was a sufficient compliance with the condition required by the will.

Mr. *Simpkinson*, and Mr. *Smythe*, for the plaintiff.—First, supposing the condition not to have been performed, we submit that it was a condition subsequent, which has been destroyed by the act of God. The estate vests absolutely in Elizabeth Linney by the first words of the will, and cannot be divested by a subsequent condition which is incapable of taking effect: *Co.*

Litt. 206, a., *Peyton v. Bury*,(a) *Thomas v. Howell*,(b) [*228] *Graydon v. Hicks*,(c) *Aislabie v. *Rice*,(d) *Burchett v.*

Woolward,(e) *Cary v. Bertie*,(f) Secondly, the condition has been performed, and the case is distinguishable from *Hawkes v. Baldwin*,(g) *Burgess v. Robinson*,(h) *Tulk v. Houlditch*,(i)

Mr. *Prendergast*, for the defendants, the trustees.

Mr. *Wigram*, and Mr. *G. L. Russell*, for the devisees over.—One party is as much an object of the testator's bounty as the other; and the condition should be construed strictly: *Roundell v. Curren*,(j) *Tulk v. Houlditch*. The cases in which the non-performance of conditions subsequent has been held not to affect

(a) 2 P. W. 626. (b) 1 Salk. 170. (c) 2 Atk. 16. (d) 3 Madd. 256.
 (e) Turn. & R. 442. (f) 2 Vern. 333. (g) 9 Sim. 355. (h) 3 Mer. 7.
 (i) 1 Ves. & B. 248. (j) 2 Bro. C. C. 67.

1843.—Tanner v. Tebbutt.

the devise, are quite inapplicable where there is an express gift over on failure of the performance of the condition. If the event happens on which the estate is to go over, it does go over: *Jarm. Wills*, vol. 1, p. 809. That is a reasonable and natural construction. In answer to the argument that the condition has been performed, it may be submitted that the word "personally" is reciprocal, and applies as much to the executors as the claimant: and if so, the condition has not been performed.

THE VICE-CHANCELLOR.—I am of opinion that this condition has been performed, and, that being so, it is unnecessary to give an opinion upon the other point in the case. The testatrix appears to have intended to provide for relations, with the fact of whose existence she was not accurately acquainted. In order therefore to prevent false claims from being made upon the executors, she directs that the persons to whom she has given her estate shall, within seven years next after her decease, personally appear, that is, as I apprehend it, appear in [*229] their proper persons, before her executors, and deliver to them a testimonial of their identity. Now, if I am right in considering that the word "personally" refers only to those persons who are previously mentioned in the will, which I think is the proper construction, the omission of the repetition of that word in the second branch of the sentence in which it occurs, is not immaterial.

Whether the executors could or could not delegate their judgment of the validity of the testimonial it is not necessary to decide. But I apprehend that the act of appearance was an act not necessary to be done before the two executors in their own proper persons: it might, in my opinion, according to the true construction of the will, be done before one of the executors; especially when it is considered how many circumstances might have arisen, if a strictly literal construction of the will were adopted, to disappoint the intention of the testatrix; for instance, suppose the claim had been made by the issue mentioned in the will, and the issue had been infants: could it have been contended that this Court could not dispense with the delivery of a testimonial of identity by the infants?

 1843 —Tanner v. Tebbutt.

It appears to me therefore that enough has been done in this case to satisfy the language of the will. But there is also another consideration. The executors who are to judge of the performance of the condition, in effect, tell the devisee how the act which is to be the performance of the condition shall be done; and she does it accordingly. Under such circumstances is it competent to the executors to object to the manner in which the condition has been performed?

Declare that the condition has been performed.

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*SAYER V. WAGSTAFF.

1843: Feb. 21st.

An allegation of an assignment of an interest in the suit from one co-plaintiff to another, who is not otherwise a proper party, must be proved at the hearing.

THIS was a suit to set aside, amongst other deeds, a deed by which an annuity had been granted on the 20th July, 1837, by the plaintiff Francis Hill to the defendant John Wagstaff, and secured collaterally upon the real estates of Hill.

The bill stated certain indentures of the 1st and 2nd July, 1838, whereby the plaintiff Hill conveyed and assigned to his co-plaintiff James Sayer his real and personal estate, upon trusts for the benefit of the creditors who should execute the deeds, with an ultimate trust in favor of himself. At the hearing, no evidence was given of the execution of these deeds, nor were they produced. It was objected on the part of the defendants, that there was a misjoinder of plaintiffs, inasmuch as it was not proved that Sayer had any interest.

The counsel for the plaintiffs contended that the allegation by one plaintiff of a conveyance to the other was sufficient, and cited *Ryan v. Anderson*.(a)

THE VICE-CHANCELLOR expressed his dissent from that case,

(a) 3 Madd. 174.

 1843.—Sayer v. Wagstaff.

which he conceived to be at variance with *Cholmondeley v. Clinton*.^(a) If the mere allegation of the plaintiffs were admitted as sufficient proof of an assignment by one to the other who would not otherwise be properly on the record, the record might be crowded with improper parties, and continual abatements might be occasioned. His Honor added, however, that he would not dismiss the bill for such a slip, if the evidence could be supplied.

Mr. *Simpkinson*, Mr. *Moore*, Mr. *Russell*, Mr. *Parry*, and Mr. *Cameron*, appeared for the different parties.

 *HEAD V. RANDALL.

[*231]

1843: Feb. 18th and 25th.

A testator gave £150 to A. and B. at their respective ages of twenty-one, or days of marriage, which should first happen, but in case either of them should die without issue before his or her legacy should become payable, then his or her legacy was to be paid to the survivor and his or her issue. The testator then gave the residue of his estate unto his grand-daughters C. and D., equally to be divided between them, and if but one of them should attain twenty-one, then the residue was to go to the survivor; and he declared that the provision thereby made for C. and D. should not be subject to the control of their husbands, but should be vested in his executors, in trust, for the benefit of C. and D., and their issue respectively, until they should attain twenty-one, being unmarried, or if married, until a proper and adequate settlement should be made upon them and their issue; but in case they should both die before they attained twenty-one, and without having issue, then he gave the residue over. C. and D. both lived to attain twenty-one:—*Held*, that although the word issue in the bequest to A. and B. could clearly only mean children, yet it did not follow of necessity, that in the subsequent bequest to C. and D. it must have the same limited construction put upon it; but that it included all the issue of C. and D. living at their respective deaths generally, and that such issue took *per capita* as tenants in common.[1]

ROGER ROBERTS by his will, dated the 24th July, 1789, gave the sum of £150 each unto his two grandchildren Charles Bur-

(a) 4 Bligh, 123.

[1] See *Carter v. Bloodgood's Ex.* 3 Sand. Ch. R. 299; *Pond v. Bergh*, 10 Paige Ch. R. 140, 152.

1843.—Head v. Randall.

rows and Ann Burrows, at their respective ages of twenty-one years or days of marriage, which should first happen, with interest for the same at the rate of £4 per cent. per annum from the death of his wife until the day of payment thereof, respectively; but in case either of his said two grandchildren should depart this life without issue before his or her legacy should become due and payable according to that his will, then his will and mind was that the legacy and interest of him or her so dying should go and be paid to the survivor of his said two grandchildren and his or her issue lawfully to be begotten. And all the rest and residue of his estate and effects, and the dividends, interest, and produce thereof he gave and bequeathed unto his two grand-daughters Elizabeth Davis and Ann Davis when and as they should respectively attain their ages of twenty-one years, equally to be divided between them; and if but one of his said two grand-daughters Elizabeth and Ann Davis should attain the age of twenty-one years, then the whole residue of his estate and effects should go and be paid to the survivor of his said two grand-daughters; and in the mean time and until his said two grand-daughters should attain their respective ages of twenty-one years he directed his two executors thereafter named, and the survivor of them, his executors and administrators, by and out of the interest and dividends of the residue of his [232] said *personal estate, to pay and apply the sum of £20 a year for and towards each of their maintenance and education, but no further or greater yearly sum until they should respectively attain the age of twenty-one years. And his will and mind further was, that the provision thereby made by him for his said two grand-daughters Elizabeth and Ann Davis should not be subject to the control, debts or engagements of any husband with whom they might respectively intermarry, but should remain and continue vested in his said two executors, and the survivor of them, his executors and administrators, in trust for the benefit of his said two grand-daughters and their issue respectively until his said two grand-daughters should respectively attain the age of twenty-one years, being unmarried, or if married, until a proper and adequate settlement should be made upon them and their issue, but so that his said two grand-daugh-

ers in the meantime should receive the interest or dividends of their respective shares of the residue of his estate and effects notwithstanding their coverture, and without the intervention or control of their respective husbands, and to be in nowise subject to their debts or engagements; but in case both his said grand-daughters Elizabeth Davis and Ann Davis should depart this life before they should attain their respective ages of twenty-one years without having issue, then he gave the whole residue of his estate and effects unto [a blank occurred in this part of his will:] and he thereby appointed his wife, and his neighbours of the artificial stone manufactory, and Thomas Randall, executrix and executors of his will.

The testator at his death left his two grand-daughters Elizabeth and Ann Davis surviving, who both lived to attain twenty-one. The former married William Head, her first husband, before she attained twenty-one. After his death she married James Randall. No settlement was made on either marriage.

In the year 1809, a suit was instituted in this Court by *Mr. and Mrs. Randall against the testator's surviving [*233] executor and Joseph William Southall and Ann his wife (formerly Ann Davis;) and by an order made in that suit on further directions by Sir *John Leach*, dated the 13th day of December, 1819, the Court declared that Elizabeth Randall was entitled for her life, for her separate use, to the interest of the sum of £1300 Reduced Annuities therein mentioned, and directed such residue of stock to be carried over to her separate account: and it was ordered that the interest thereof, when so carried over, should be from time to time paid to her during her life, for her separate use, and the Court declared, that upon her death the issue of the said Elizabeth Randall would become entitled to the residue of the said £1300 Reduced Annuities.

Elizabeth Randall died on the 28th December, 1841, leaving issue by her first marriage two children and four grand-children, and by her second marriage six children and eleven grand-children.

The bill in the present suit was filed by the children of Mrs. Randall against her grand-children, the question raised in the suit being, whether the plaintiffs alone as the children of Mrs. Randall, or the plaintiffs and the defendants as constituting the issue of Mrs.

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Randall living at the time of her decease, were entitled to the residue of the £1300 Reduced Annuities.

Mr. *Spence* and Mr. *Wood*, for the plaintiffs.—The testator in the first place gives the sum of £150 to each of his two grandchildren Charles Burrows and Ann Burrows, at their respective ages of twenty-one years or days of marriage, which shall first happen; but he directs that, in case either of his said two grandchildren shall depart this life without issue before his or her legacy shall become due and payable, the legacy and interest of him or her so dying shall go and be paid to the survivor [*234] of his said two *grand-children and his or her issue.

The word “issue” in this clause is clearly used in the sense of children, and children only, and from the circumstance of the legatees being both minors cannot have any other meaning applied to it. The construction which must unavoidably be given to the word “issue,” as used in the first clause, must necessarily be the construction given to the same word in the last clause. The direction in the will for the making a proper and adequate settlement on his two grand-daughters Elizabeth Davis and Ann Davis and their issue, would be fully satisfied by giving it to the children: *Ridgeway v. Munkittrick*.(a) The grand-children are unequal in point of number, and there is no method pointed out for determining whether they are to take *per capita* or *per stirpes*. If the bequest be confined to children this difficulty will not arise. The only possible way of understanding the decree in the first cause is, that the Court must have considered that Elizabeth Randall took an estate for life, and that there was to be a settlement on her and her issue; and if a settlement were now to be made it would be made to the parent for life, with remainder to the issue living at her death. *Stonor v. Curwen*,(b) *Sibley v. Perry*.(c)

Mr. *Miller* and Mr. *Adams*, for the defendants, were not called upon to address the Court, the *Vice-Chancellor* expressing his opinion to be, that the word “issue” meant all the issue living at the death of Mrs. Randall generally, and that they took *per cap-*

(a) 1 Dr. & W. 84.

(b) 5 Sim 264.

(c) 7 Ves. 522.

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ita as tenants in common, but stating that before finally disposing of the case he would reconsider it.

Feb. 25th.—THE VICE-CHANCELLOR.—The question in this case relates only to the share of Elizabeth Davis afterwards *Elizabeth Randall, now deceased, in the residue [*235] of the testator's estate. That she was not absolutely entitled to that share, but was tenant for life of it, was decided by the decree of Sir *John Leach* in 1819, and all the parties now before me agree in that construction of the will. That as she had children and grand-children living at her death, some class or description of her issue became then entitled to the fund is also agreed by all parties, and appears likewise declared by Sir *John Leach's* decree. But I do not consider Sir *John Leach* as having intended to decide the single question before me, which is, what class or description of her issue did so become entitled. The only word in the will under which any children or other issue of Elizabeth Randall can claim is the word "issue." Before I can restrain that word from its legal and proper import I must be satisfied that the contents of the will demonstrate the testator intended to have used it in a restricted sense. The language of Lord *Eldon*, applied to property in *Church v. Mundy*,^(a) may probably be well applied to persons in a case such as the present. I accede entirely to the doctrine to be found in *Sibley v. Perry* and numerous other cases of that kind, but I do not concur in the argument which seeks to apply that doctrine to the will in this cause. It is true that Charles and Ann Burrows or Elizabeth and Ann Davis, if dying minors, could not so die leaving any issue but children, still the word issue stands in the will used with perfect correctness according to the testator's intention as to Charles and Ann Burrows, and also when it is used for the last time in the will. And it cannot, I think, be inferred, because he accurately and properly calls the children of minors, whose issue could only be children, "issue," that he must, therefore, when using the same word with reference to different circumstances, be supposed to mean children only. A testator, who in one part *of his will makes a provision for the next or [*236]

(a) 15 Ves. 396.

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kin of an illegitimate person, is not therefore, when in another part of his will he provides for the next of kin of a legitimate person, to be held to mean only issue of the latter. Suppose a gift to the issue of A. B. his first wife, deceased, whose only issue then living are grandchildren. is it to be said that if the word "issue" be elsewhere used in the same instrument with reference to A. B. and his second wife, or with reference to other persons, that it must be taken therefore to be so used exclusively of children? Nor do I find any argument in favour of the plaintiff's construction in what the testator has said respecting a settlement; or on the whole any sufficient warrant for giving the word "issue," as used with reference to Elizabeth Randall, a construction different from its ordinary and proper meaning. Circumstanced, therefore, as this case at present is, I must declare that all the issue of Elizabeth Randall, living at her death, became, upon that event, absolutely entitled to the fund of which she was decided to be tenant for life, and I think not as joint tenants, but as tenants in common *per capita* equally.[1]

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*CROSSE V. GLENNIE

1843: Feb. 18th and 20th.

A testatrix, by her will, devised certain messuages and hereditaments unto trustees and their heirs, to the use of the trustees, their executors and administrators, for the term of ninety-nine years, with remainder to the use of A. for life, and after her decease to the use of B. for life, and after his decease to the use of the first and every other son of his body, lawfully begotten, severally and successively, according to priority of birth, and of the heirs male of the body and respective bodies of such first and other son and sons, and in default of such issue to the use of C. for life, with remainder to his first and other sons in tail male, with remainders over. The trusts of the term of ninety-nine years were declared to be that the trustees should, out of the rents and profits of the estates, insure the messuages, and keep the same in good repair during the respective lives of the several tenants for life, and should, during the respective minorities of each and every person thereby

[1] See *Slater v. Dangerfield* 16 Law J. En. Ch. 51; *Williams v. Teale*, 6 Hare, 239, that where, upon the decease of the testator's "children," the estate was given over; in case the testator's children should die "without leaving issue; and in like uses of the word "issue" must be read "child or children," although, in other parts of the will, it might be necessary to read the word "issue" in a different sense.

1843.—Crosse v. Glennie.

made tenants for life or in tail, apply the surplus or residue of the rents and profits for and towards the maintenance and education of the tenants for life or in tail, who for the time being should be entitled in possession to the estates; and in case the whole of the surplus of the said rents and profits should not, during the minority of any such tenant for life, or in tail as aforesaid, be applied for his or her maintenance and education, then the surplus thereof was from time to time to be laid out on real or government securities, at interest, in the names of the trustees, upon trust for such person or persons from time to time as for the time being should under the limitations of the will be entitled in possession to the said estates: and if any person who might become entitled in possession or remainder to an estate tail in the estates under any of the said limitations should die under twenty-one, without issue inheritable to such estate-tail, then so often as any such event should happen within the period of time in which executory devises were allowed by law to take place, the absolute interest in the monies so directed to be laid out and invested was to be considered as not having vested in such person, but the same was to go over to the next taker:—*Held*, that the first tenant for life in possession of the estates was not absolutely entitled to the accumulations of the rents and profits which had accrued during his minority, but was only tenant for life of such accumulations.

SOPHIA DELROUX, by her will, dated the 30th October, 1824, devised all her messuages, lands, and real estate whatsoever and wheresoever, unto Jeffries Spranger, Esq., and Robert James, surgeon, and to their heirs, to the use of them the said Jeffries Spranger and Robert James, their executors and administrators for the term of ninety-nine years; and from and after the expiration or other sooner determination of the said term of ninety-nine years, and in the mean time subject thereto and to the trusts thereof, to the use of her sister Elizabeth Barret, since deceased, during her life, with remainder to the use of Thomas Francis Crosse and his assigns during his life, with remainder to the use of the said J. Spranger and Robert James and their heirs during the life of the said T. F. Crosse, upon the trusts thereafter mentioned, with remainder to the use of the first and every other son of the body of the said T. F. Crosse, lawfully begotten, severally and successively, according to the order of their birth, and of the heirs male of the body and respective bodies of such first and other son and sons, the elder of sons and the heirs male of "his [*238] body being always preferred to, and to take before the younger of such sons and the heirs male of his body; and in default of such issue, to the use of Aretas Young Crosse, the

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second son, then living, of the testatrix's great niece, Marianne Crosse, and his assigns, during his life, with remainder to the use of the said J. Spranger and Robert James, and their heirs, during the natural life of the said A. Y. Crosse, upon the trusts nevertheless thereafter mentioned, with remainder to the use of the first and every other son of the body of the said A. Y. Crosse, lawfully begotten, severally and successively, according to the order of their birth, and of the heirs male of the body and respective bodies of such first and other sons, the elder of such sons and the heirs male of his body being always preferred to and to take before the younger of such sons and the heirs of his body; and in default of such issue, to the use of all and every the other son and sons of the said testatrix's said great niece, Marianne Crosse, lawfully begotten, severally and successively, according to the order of their birth, and of the several and respective heirs male of the body and bodies of such son and sons, the elder of such sons and the heirs male of his body being always preferred to, and to take before the younger of such sons and the heirs male of his body, with divers remainders over, and with an ultimate remainder to the use of the said J. Spranger, his heirs and assigns for ever. And the testatrix thereby declared that the several uses and estates so limited to the said J. Spranger and Robert James, and their heirs, during the respective natural lives of the said T. F. Crosse, A. Y. Crosse, Marianne Elizabeth Crosse, and Elizabeth Sophia Gordon, to whom life interests in the said estates were given by her will, were so limited to them the said J. Spranger and Robert James and their heirs upon trust to support and preserve the contingent uses and estates thereby limited. The term of ninety-nine years was declared to be limited upon trust that the said parties [*239] should by, with, and out of the rents and profits of the said messuages and other hereditaments insure the messuages and buildings thereby devised, or at any time or times thereafter to be erected and built upon any of the lands thereby devised, and keep the same insured from loss or damage by fire in such sum or sums of money as he or they might think proper, and also from time to time keep the same in good and tenantable repair during the respective lives of the several persons

1843.—Crooke v. Glennie.

who were thereby made tenants for life, and during the minorities of the several persons thereby made tenants in tail; and upon this further trust that they the said J. Spranger and Robert James, and the survivor of them, and the executors and administrators of such survivor, should, during the respective minorities of each and every person thereby made tenants for life or in tail, apply the surplus or residue of the rents and profits for and towards the maintenance and education of the tenants for life or in tail who for the time being should be entitled in possession to the said messuages or other hereditaments, or pay and apply so much of the surplus or residue of the said rents and profits for the purposes aforesaid as they the said J. Spranger and Robert James, or the survivor of them, or the executors or administrators of such survivor, should in their or his discretion think fit and deem reasonable; and she thereby declared that the said J. Spranger and Robert James, and the survivor of them, and the executors and administrators of such survivor, should have full power and authority at their or his own absolute will and pleasure to apply the said surplus of the said rents and profits for maintenance and education as aforesaid, and without any reference to or any authority from any Court of equity, and without any regard to the ability of the father of any such minors or tenant for life or in tail to maintain and educate him or her; and she thereby declared that, in case the whole of the said surplus of the said rents and *profits should not, during [*240] the minority of any such tenant for life or in tail as aforesaid, be applied for his or her maintenance and education, then the surplus thereof should from time to time be laid out, when the same should amount to a competent sum, on real or government securities at interest in the names or name of the said J. Spranger and Robert James, or the survivor of them, or the executors or administrators of such survivor, who should be possessed thereof, upon trust for such person or persons from time to time as for the time being should, under the limitations of her will, be entitled in possession to the said messuages and other hereditaments thereby devised; nevertheless, she thereby declared that if any person who might become entitled in possession or in remainder to an estate tail in the said messuages and

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other other hereditaments under any of the said limitations should die under the age of twenty-one years without leaving issue inheritable to such estate tail, then and so often as any such event should happen within the period of time in which executory devises are allowed by law to take place, the absolute interest in the monies so directed to be laid out and invested as aforesaid should be considered as not having vested in such person, but the same should go over to the next taker of the said messuages and other hereditaments under and according to the said limitations, and subject also to that proviso.

The will contained a power for the respective tenants for life when in possession, and for the trustees during the minority of the tenants for life, to grant leases for twenty-one years at rack-rent, and also to grant building leases. The will also gave the trustees a power of sale and exchange, with the consent of the persons in possession for the time being.

The testatrix died shortly after the date of her will ; and after her decease, her trustees received the rents and profits of the estates, out of which they paid the insurance of the [*241] *houses and buildings, and maintained and educated the plaintiff, who was then an infant ; and they invested the surplus of such rents to accumulate.

Jeffries Spranger died on the 20th April, 1840, and his co-trustee Robert James died in February, 1841, having made his will and appointed the defendants John Glennie and Thomas Thompson and one Richard Sawny his executors ; the two former of whom alone proved the will.

Elizabeth Bennett, the testatrix's sister, died in July, 1829.

Marianne Crosse, the great niece of the testatrix, had two sons born after the date and execution of the testatrix's will, viz. the defendants Aretas George Crosse and Arthur Charles Crosse.

Thomas Francis Crosse attained his age of twenty-one years on the 12th February, 1840, and, as the first tenant for life in possession of the estates devised by the will of the testatrix, he, on the 3'd February, 1841, filed his bill against the defendants John Glennie and Thompson, as the devisees and executors of Robert James the surviving trustee under the will of the said testatrix, and against the defendant Aretas George Crosse, as the

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next tenant for life in remainder, and the defendant Arthur Charles Crosse as the first tenant in tail in remainder expectant on the estates for life of the plaintiff and of the defendant Aretas George Crosse. The object of the bill was to obtain a declaration that the plaintiff, as the first tenant for life, was entitled to have transferred and paid to him the trust fund and accumulations, and the interest, dividends, and produce thereof arisen from the surplus rents and profits of the said estates during the minority of the plaintiff, and a transfer thereof. But, in case the Court should be of opinion that the plaintiff was only entitled to a life interest in the trust funds and accumulations, then payment of the interest of such accumulations, and to have the capital of such accumulations secured for the benefit of the plaintiff and the other parties.

*The plaintiff entered into evidence to prove the state [*242] of his family.

Mr. *Cooper* and Mr. *Metcalf*, for the plaintiff.—The testatrix contemplated that there might be accumulations during successive minorities, and therefore gave the accumulations to the person for the time being in possession. The only event which the testatrix intended to provide against was that of any person dying under twenty-one. If it rested upon the first limitation there could not be any doubt but that a person who attained majority would be entitled to the accumulations made during his minority.

Mr. *Spence* and Mr. *Bacon*, for the tenant for life in remainder and the first tenant in tail.—The accumulations go in the same line and are to be enjoyed in the same manner as the estate. To support the argument for the plaintiff, there must be as many different funds arising from accumulations as there are tenants for life. The testatrix has endeavored to prevent a tenant in tail who should die without issue inheritable from becoming entitled, and has endeavored to steer clear of the case of *Lord Southampton v. The Marquis of Hertford*.(a)

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Mr. *Shadwell*, for the trustees.

Mr. *Cooper*, in reply.—The case would clearly have been within the principle of the case of *Lord Southampton v. The Marquis of Hertford*, but for the words introduced into the proviso. The object of the testatrix is manifest. She intended that no person should take the funds under the age of twenty-one, but whether tenant for life or in tail does not appear. The proviso extends only to the case of tenant in tail dying under twenty-one; tenant for life is omitted by accident. The first clause undoubtedly gives the accumulations to the tenant for the [*243] time being, "in possession, whether tenant for life or in tail. If it had rested at the words "hereby devised," no doubt could have existed.

Feb. 25th.—THE VICE-CHANCELLOR.—The question which has been argued before me in this cause is upon the construction of the will of the testatrix as to the trusts of the term of ninety-nine years created by it. Whatever the construction ought to be, it has not been contended that those trusts are either wholly or partially void, and I have therefore assumed their validity without examining closely the value of the differences between this case and those of *Lord Southampton* and *Sir Charles Ibbetson*. The point to be upon this footing decided is, whether the first tenant for life, having attained majority, is entitled absolutely or only for life to the benefit of the funds composed of the savings for the rents during his minority.

Having read and considered the will, I am of opinion he is not entitled absolutely. Some argument at least in favor of this construction may be derivable from the terms of the first of the two clauses relating to the subject. The words, however, "in possession or in remainder," which occur in the second clause, the circumstances that it relates only to the case of a tenant in tail and not to a tenant for life, and the concluding expressions of the clause, are, when taken in connection with the rest of the two clauses, such as to lead, in my judgment, to the interpretation I have stated, namely, that the first tenant for life in possession of the real estate is tenant for life of the fund composed of

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the savings in question: and this was my view of the matter at the conclusion of the argument, though my original impression, formed, however, whilst I supposed the tenor of the two clauses to be in some respects otherwise than it is, had been different.

I think the costs of all parties should be paid out of the *corpus* of the accumulations.

*WILTON V. JONES.

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1843: Feb. 23d.

Qu. whether the 30th of the Orders of August, 1841, applies to the case of a bill of foreclosure of freeholds devised in trust for sale.

WILLIAM JONES, being seised in fee of a freehold estate, mortgaged it for a term of years to a person who assigned the mortgage to Sarah Madden, who married the plaintiff. Upon the death of Sarah, the plaintiff took out letters of administration of her effects.

Jones by his will devised all his real estate to his sons Frederick and Henry and their heirs, upon trust to sell the same at their discretion, with power to give discharges for the purchase-money, and, after payment of the testator's debts, to divide the proceeds of the sale amongst all his children, naming them, including Frederick and Henry.

The bill was filed by the plaintiff against Frederick and Henry Jones as trustees under the will, without making the other children parties to the suit, praying a foreclosure.

Henry Jones never acted in the trust, and by his answer disclaimed all interest in the matter of the suit.

On the cause coming on for hearing, the plaintiff's counsel did not appear, but his solicitor pressed for a decree.

Mr. *Crawford* appeared for the defendant Henry Jones.

The Vice-Chancellor questioned the propriety of the frame of the suit with regard to the parties; observing that, although executors would be sufficient parties to a suit for foreclosing chattel leaseholds, yet to a bill for foreclosing freeholds held in trust, the

 1843.—Wilton v. Jones

cestuis que trustent as well as the trustees had hitherto been considered necessary parties.[1] His Honor said, that if the 30th of the Orders of August, 1841, applied to this case, the decree would be binding on the *cestuis que trustent*; but he would give [*245] no opinion whether *that Order extended to such a case as this. If the plaintiff chose to take such a decree as he could abide by, he might do so.

DECREE of foreclosure *nisi*; the defendant Henry Jones to be allowed his costs as between party and party; such costs to be paid by the plaintiff and added to the plaintiff's debt.

 CONINGHAM V. PLUNKETT.

1843: March 18th.

A person who was entitled to certain stock standing in the names of two trustees, gave instructions to his attorney to prepare a settlement of it for the benefit of A. B. and C., and to procure from the trustees a transfer for the purposes of settle-

[1] See Story's Equity Pl. s. 193; *Weatherhy v. St. Gioys*, 2 Hare, 64; *Baker v. Harwood*, 1 Hare, 327; *Holland v. Baker*, 3 Hare, 69; *Gore v. Stackpole*, 1 Dow P. C. 18, 31; *Barkley v. Lord Reay*, 2 Hare, 306; *Yates v. Hambley*, 2 Atk. 238; *Williamson v. Field*, 2 Sand. Ch. R. 563. In *Anderson v. Stother*, 2 Collyer, 209, was a case where the mortgages conveyed the equity of redemption to trustees in settlement for his daughter on her marriage, out of which she was to receive an annuity, and the trustees were to raise out of the same a sum of money for the children of the marriage, it was held that the daughter and her children were necessary parties to a suit for the foreclosure of the mortgage.

In *Caverly v. Phelps*, 6 Mad. 229, the equity of redemption had been conveyed to trustees to sell and divide the surplus among persons specified, and the receipt of the trustees was to discharge the purchasers. It was held that the *cestuis que trust* were necessary parties to a bill brought to foreclose the mortgage.

It is not enough to constitute an exception to this general rule, that the *cestuis que trust* must be made parties; that the trustees, who are parties, may be clothed with the legal estate as well as the ultimate remainder, or that the *cestuis que trust* are infants and *quasi* wards of the court, see *Williamson v. Field*, 2 Sand. Ch. R. 563. Sandford, Assistant V. C. in the case last cited, said, "the only established exception, is in cases of remote limitations of the equity of redemption; in which, on account of the impossibility of bringing parties not *in esse* or not ascertained, but who ultimately may become entitled, it is held sufficient to bring before the court the persons *in esse* who have the first estate of inheritance, together with the persons having all the precedent estates and prior interests."

1843.—*Coningham v. Plunkett*.

ment. The settlement was prepared, and a power of attorney for the transfer of the stock executed by both the trustees, but the intended settler died without having seen the settlement, and before the stock was actually transferred:—*Held*, that no trust of the stock was constituted for A., B. and C.

COLONEL FREDERICK EVELYN being possessed of, amongst other property, the sum of £5000 New £3½ per cent. Annuities, by his will dated the 17th April, 1834, gave and bequeathed all his money, securities for money, stock in the public funds and all other his personal estate, which he might be possessed of at the time of his decease, unto his sister Elizabeth Evelyn, spinster, her executors, administrators and assigns, absolutely; and he thereby appointed her sole executrix of his will.

By a codicil, dated the 3rd January, 1836, the testator gave and bequeathed to his sister, the said Elizabeth Evelyn, all stock in the English funds that he might possess at his decease, for her life, and for her children; and in the event of her not having children, the testator bequeathed the same to the children and their descendants of his aunt Ellen Maria Coningham.

By a subsequent codicil the testator appointed the plaintiff John Coningham an executor of his will.

On Sunday the 30th April, 1837, Mr. White, a solicitor, received a message from Colonel Evelyn to the effect that he, Colonel E., wished to see him on the subject of his pecuniary affairs. Mr. White accordingly called at the Colonel Evelyn's lodgings in Maddox-street, Hanover-square, in the forenoon of that day, and found him sitting *upon a sofa apparently in [*246] an ill though not an alarming state of health. After some conversation of a general nature, the Colonel told White that he wished to make some alteration respecting the disposal of the £5000 New £3½ per cent. Annuities, and he expressed a strong desire to secure that stock to his only sister the before named Elizabeth Evelyn; having, as he said, an income sufficient for his wants without it. After some further conversation to the same effect, Mr. White took down Colonel Evelyn's instructions in writing. Having done so, he read them over to the Colonel, who expressed his approbation of them, and instructed him to carry them into execution with as little delay as possible.

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The instructions were as follows :—Maddox-street, Sunday, 30th April, 1837. Mr. White to obtain power of attorney from Samuel D. Broughton and R. E. Broughton, Esqs., Colonel Evelyn's trustees, to transfer £5000 New £3½ per cents. belonging to him as follows :—£2000 into the name of Miss E. Evelyn, of York-terrace, Regent's-park, Colonel Evelyn's sister, for her own use, and £3000 in the names of the said R. E. Broughton and Ellen Maria Coningham, widow, of Upper Gower-street ; to prepare a settlement of the latter sum, on trust to pay dividends to Miss Evelyn for life, then the principal to her children equally ; in default of children, £1500 to John Coningham, £750 to E. M. Coningham, £750 to Elizabeth Coningham.

In consequence of a caution given to Mr. White by Mrs. Coningham, who was present at the interview, not to do anything which might lead Colonel Evelyn to think he was in immediate danger, Mr. White did not obtain from the testator his signature to these instructions.

Colonel Evelyn having several times, at the interview, expressed a wish that the business should be completed as soon as possible, White on the following day ordered Messrs. [*247] Drummonds to procure a power of attorney for the execution of the trustees. On the 4th of May, the power was executed by the trustees, and on the following day placed in the hands of bankers ; and in the mean time a deed of settlement was prepared in accordance with the instructions. The Colonel, however, never saw the deed nor any draft of it ; and on the 7th May he died. On the 9th May, Robert Drummond, one of the attornies named in the power, transferred £2000 stock, part of the £5000 New £3½ per cent. Annuities, from the names of the trustees into that of Elizabeth Evelyn, and the residue, namely £3000 stock, into the names of R. E. Broughton and Ellen M. Coningham.

After Colonel Evelyn's death, Elizabeth Evelyn married Randall E. Plunkett, on which occasion a settlement was made of her interest in the £5000 stock, subject to any question in equity as to her right therein.

The cause now came on for hearing for further directions, upon the facts before stated, which were duly found by the Mas-

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ter; and the question was, whether under the circumstances a trust was constituted of the £5000 stock in favor of Mrs. Plunkett and the other parties named in the instructions.

Mr. Teed and Mr. Dickenson, for the plaintiff.

Mr. Swanston and Mr. Calvert, for the defendant Mrs. Plunkett.—The instructions were communicated to the trustees, and all that they and Colonel Evelyn could do to effect a transfer was done. Nothing remained to carry the transaction into effect but the mechanical form of the execution of the trust. Where the matter rests in agreement, this Court will not interfere to carry a voluntary trust into execution; and in the case of an assignment of a debt, though the agreement is in the form of an assignment, yet if it be voluntary the Court will not carry it into execution. But it is otherwise where notice has been "given to the trustees, and nothing further can be done" [*248] by the owner of the equitable interest: *M'Fadden v. Jenkyns*,^(a) *Wheatley v. Purrr*,^(b) *Benbow v. Townsend*.^(c)

Mr. Cooper, Mr. Elderton, Mr. Kinglake, Mr. Wilcock, Mr. Campbell, and Mr. Glasse, appeared for other parties.

THE VICE-CHANCELLOR.—I do not dispute the doctrine contained in the authorities which have been cited. The question however in this case is, whether every thing that was necessary to be done to complete the transfer took place in the lifetime of Colonel Evelyn. It is clear that he intended that this stock should be settled, or, in other words, that it should not be transferred without a settlement; and steps were taken for that purpose. What was done, however, was merely preparatory. Colonel Evelyn did nothing which he could not have countermanded. Had he lived he might have revoked the instructions; his death effectually did so.

DECREE that the fund in question be transferred to the personal representatives of the testator.

(a) 1 Phillips, 153; 1 Haro, 458.
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(b) 1 Keen, 123.
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(c) 1 Myl. & K. 506.

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*PICKERING V. THE BISHOP OF ELY.

1843: March 18th, 20th, 21st, 25th, April 7th.

By a grant or patent, dated in 1801, the then Bishop of Ely having, as the grant stated, "confidence in the probity, fidelity, care, and industry of P.," granted to P., who was a solicitor, "the office of receiver of all issues, profits, sum and sums of money, arising and issuing" from the possessions of the see, to hold to P. by himself or his sufficient deputy or deputies, to be approved of by the bishop and his successors, for his life. The office of receiver was an ancient office, and had been exercised before the restraining statute of 1 Eliz. c. 19. P. held the office under three successive bishops, during the whole of which time he not only received the rents, but negotiated the renewal of leases, and prepared the leases of the see, and likewise attended all searches for records in the bishop's muniment room, of which he kept a key; for the performance of which acts he received fees and emoluments. It appeared also that his predecessor in office, who had held the office since 1785, had done the same. Upon the accession of A. to the bishopric in 1836, he refused to admit P.'s claim of right to perform these last-mentioned acts; upon which P. filed his bill against the bishop, praying a declaration of the rights in question in his favor, that he might be quieted in the possession of the office, and that the bishop might be restrained by injunction from obstructing the plaintiff in the exercise of such rights, and from doing acts in contravention of them:—*Held*, first, that the plaintiff's claims were not of such a nature as to induce this Court to interfere to protect them, without being well satisfied (which the Court was not) that his legal remedy was insufficient to do him complete justice; and, secondly, that the relief sought being analogous to the specific performance of an agreement, the bill must fail, on the ground of want of mutuality; the nature of the duties and services asserted by the plaintiff being such as to preclude the possibility of a decree in this Court against him, compelling their specific performance.

Discussion of the rules of evidence relating to declarations in writing by deceased persons, made in the ordinary course of business.

From the year 1785 to the year 1801, George Andree, a solicitor, was receiver-general of the revenues of the see of Ely. Upon his death in February, 1801, the plaintiff Edward Rowland Pickering, who had been a clerk of Andree, and who was executor of his will, succeeded him, not only in his business of solicitor, but also as receiver. The receivership was granted to him by a patent or grant, dated the 26th February, 1801, under the episcopal seal of the bishop of Ely, (who at that time was the Right Rev. Dr. James Yorke,) and was in the following terms:—

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"To all the faithful in Christ, to whom these presents shall come, James, by divine permission, Lord Bishop of Ely, sendeth everlasting health in the Lord : Know ye, that we the said bishop having confidence in the probity, fidelity, care and industry of Edward Rowland Pickering, of Staple Inn, London, gentleman, have given and granted, and by these presents, for ourselves and our successors, do give and grant unto the said Edward Rowland Pickering, the office of receiver of all issues, profits, sum and sums of money arising and issuing from all our manors, lordships, *castles, lands, tenements, here- [250] ditaments and possessions whatsoever, within the kingdom of Great Britain, to the bishoprick of Ely belonging or appertaining, and him the said Edward Rowland Pickering, receiver for us and our successors aforesaid, of all and singular issues, profits, revenues, sum and sums of money growing, arising and happening from time to time from all our manors, lordships, castles, lands, tenements, rents, hereditaments and possessions whatsoever, with their appurtenances, to whose hands soever they or any of them shall happen to come, we have made, ordained and constituted by these presents, to hold, exercise and enjoy the said office to the said Edward Rowland Pickering, by himself or by his sufficient deputy or deputies, to be approved of by us and our successors, for the term of the natural life of the said Edward Rowland Pickering ; and moreover, know ye, that we the said bishop, for the exercise and execution of the office aforesaid, have given and granted, and by these presents, for ourselves and our successors, do give and grant unto the said Edward Rowland Pickering, one annuity or yearly fee of £10, of lawful money of Great Britain, issuing out of and from all and singular our lordships, manors, lands and tenements, with their appurtenances, in the county of Cambridge, to have, hold and receive the said annuity or yearly fee to the said Edward Rowland Pickering, and his assigns, for the term of his natural life, as well by the hands of us and our successors, as by his own proper hands, or of our bailiffs, farmers, tenants, or other occupiers of our said lordships, manors, and other the premises, or any part thereof for the time being, payable yearly and every year at the feasts of Saint Michael, the Archangel, and the an-

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nunciation of the Blessed Virgin Mary, by even and equal portions, together with convenient diet for himself and two of his servants, and sufficient forage for his horses for the time of his exercising the office aforesaid, at the costs and [251] charges of us and our "successors, to be annually provided, or a reasonable compensation for the same."

The instrument then gave power of distress to the plaintiff over the manors of the see of Ely, situate within the Isle of Ely, and the county of Cambridge, to secure punctual payment of the annuity.

This grant was subsequently confirmed by the dean and chapter of Ely, and enrolled together with the deed of confirmation in the Exchequer.

Under this patent the plaintiff acted as receiver during the episcopacy of Bishop Yorke, and his successors, Bishop Dampier and Bishop Sparke; and while he so acted not only received the rents, but transacted the business of the see relating to the negotiation for the renewal of leases, the preparing of leases, and other business of a like nature, more particularly mentioned in the bill; and he received emoluments in respect of such business. Upon the death of Bishop Sparke, which took place in April, 1836, the defendant, Dr. Allen, was appointed Bishop of Ely. Soon after his confirmation in the bishopric, he expressed his determination that the business relating to the renewal of the leases of the see, and preparing such leases, should in future be transacted by his secretary; partly that the emolument of the secretary might be thereby increased, and partly that the business might be in the hands of a person who was in his confidence. This arrangement the plaintiff alleged that the defendant had no right to make; insisting that he was entitled by virtue of his office to the emoluments which the bishop claimed for his secretary: and accordingly in November, 1826, after a long correspondence between the parties, the present bill was filed.

The bill alleged, that the said office of receiver is an ancient office, and has been anciently and usually granted for life; and the annuity and fee, and the profits and privileges by the said grant expressed to be granted to the plaintiff are respectively

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the annuity and fee, profits and *privileges ancient- [*252]
ly granted with and annexed to the said office. That
the said office of receiver is also a necessary and a useful office,
and there are and have anciently been divers duties and ser-
vices to be performed and discharged by the person who, for the
time being, has held the same. *That one of the duties and ser-
vices incident to the said office, and which has been performed
by the person for the time being holding the said office, has been
the receiving of the annual and other rents reserved upon leases
granted by the bishop of Ely of lands and hereditaments to said
see belonging, and also the receiving of quit-rents, rent-charges,
tenths, pensions, redeemed land-tax, and of the fines paid upon
or for the grant or renewal of any lease made by the bishops of
Ely of any of the lands and hereditaments aforesaid, and the
receiving of all other issues and profits arising from or being
part of the possessions of the see of Ely. That one of the per-
quisites belonging to the said office, in respect of the receipt of
the rents and monies aforesaid, is and has anciently been the
receipt to the receiver's own use of certain fees paid to him by
the persons paying the aforesaid rents and other monies for or
in respect of acquittances for the same given to them by the said
receiver. That another of the duties and services annexed or
incident to the said office, and which has been performed by the
person for the time being holding the same, or his deputy, has
been the preparing or engrossing of all leases and the counter-
parts of leases granted by way of renewal or otherwise by the
bishops of Ely of lands and hereditaments to the said see be-
longing, and also of all surrenders of existing leases preparatory
to the granting of other leases by way of renewal; and that one
of the profits and perquisites appertaining to the said office, and
consequent upon the discharge of the last mentioned duty and
service, has been the receipt by the person for the time being
holding the said office, from the several and respective
lessees, of the *fees and expenses payable by them in re- [*253]
spect of and for preparing the said leases, counterparts,
and surrenders aforesaid. That there is and has anciently been
kept a register of all leases granted by the bishops of Ely of
lands and hereditaments belonging to the said see, and that, in

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some old and many of the modern and recent leases granted by the said bishops, there is a clause whereby it is provided that, all conveyances and assignments made by the respective lessees of the estates or interests granted to them by their respective leases, shall, within six months, or within some other time after the making of such conveyances and assignments, respectively be registered in the office of the receiver-general of the said see, and such registrations have accordingly been from time to time made by the said receiver, and certain fees for the work and labour in that behalf of the said receiver have been paid to the said receiver by the respective parties for whom such registration has been made. That all leases granted by the bishops of Ely, or the material terms and a description of such leases, have usually for a long time past been also registered. That there is and has anciently been a certain room set apart in Ely House, in London, the residence of the bishops of Ely, which is called the Muniment Room, wherein have been and are deposited and kept all old and expired leases formerly granted by the bishops of Ely, and all patent books, registers, and other documents and records relating to the possessions of the said see, and to the offices belonging thereto, and to such Muniment Room there have been and are two sets of keys, one whereof hath been usually kept by the bishops of Ely, and the other of such sets of keys hath been kept in the custody of the person who for the time being hath held the said office of receiver; and ever since the plaintiff hath held the same office, he hath as such receiver had the custody of one of the said sets of keys so belonging to and kept in the custody of the said receiver, which hath been and is [*254] marked upon a label annexed thereto with the words "following, (that is to say,) "Ely House, Rec.-Gen. Keys;" and that it is and hath anciently been one of the duties of the person holding the office of receiver, and the plaintiff ever since he hath held the said office, hath performed the duty of making or of being present at all searches made by persons who may at any time have been desirous of making searches in said registers and records kept in the Muniment Room aforesaid; for the performance of which duty the receiver for the time being, and the plaintiff, ever since he hath been such receiver, hath received

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for his own use certain fees from the persons making such searches as aforesaid, or requiring the same to be made; and such fees are perquisites and profits annexed and belonging to said office of receiver; and the receiver for the time being hath had the custody of one set of the keys of said Muniment Room, as hereinbefore is mentioned, for the purpose, among other things, of enabling him to execute the said last-mentioned duty belonging to said office.

The bill, after charging various matters of evidence, contained charges to the effect that, though some of the duties, rights and profits, claimed by the bill, were not emphatically mentioned in the grant to the plaintiff or the preceding grants, yet such duties and rights respectively were incident and appurtenant to the office, and were evidenced by long and uninterrupted usage and course of practice; that the right of the plaintiff to perform the duties and receive the fees of the office could not be directly tried at law; that the legal remedy for invasions by the defendant of the rights of the plaintiff, as such receiver, was inadequate, and that, notwithstanding the plaintiff might recover in an action at law against the defendant for any specific invasion of the plaintiff's rights, yet the same might afterwards be repeatedly invaded by the defendant, and that the plaintiff ought to be quieted in the possession of the office, and the defendant in the mean time, restrained from interrupting him in the performance of the duties of it.

*The prayer of the bill was as follows:—"That upon [255] a full discovery of the premises it may be declared by the decree of this Court that the plaintiff, as such receiver as aforesaid, and by virtue of the grant to him of the office of receiver, hereinbefore mentioned, is, during his life, entitled to receive for the said defendant and his successors all and every the rents and rent reserved or to be reserved upon any lease or leases of lands or hereditaments in Great Britain to the bishopric of Ely belonging or appertaining, and all and every other rents, issues and profits, sum and sums of money, and revenues to the said bishopric belonging; and also to receive all and every the fines and fine, sum and sums of money payable, or which shall or may be paid, for or in respect of any lease or leases to be

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granted of any such lands or hereditaments as aforesaid ; and also to prepare and engross all and every leases and lease, and counterparts and counterpart of all and every leases and lease to be granted by the said defendant or his successors, by way of renewal or otherwise, of any such lands or hereditaments ; and also all surrenders of leases to be executed prior to the grant of new leases ; and that the plaintiff is also entitled to receive and take for his own use, from the persons executing such surrenders and taking such leases as aforesaid, the fees and expenses payable by them in respect thereof ; and that the plaintiff may, under the decree of this Court, be quieted in the possession of the said office of receiver, and in the enjoyment of all and singular the rights and privileges, profits and emoluments thereof, and incident or appurtenant thereunto ; and that, if necessary, the right or rights of the plaintiff may be tried at law by and under the direction of this Court ; and that in the mean time the said defendant may be restrained by the order and injunction of this Court from preventing, hindering, or in any manner obstructing, and from continuing to prevent, hinder, or obstruct the plaintiff from or in receiving the rent or rents, sum or sums of money, reserved or made payable upon or by any lease or [*256] *leases of lands, or hereditaments to the bishopric of Ely belonging, or from or in receiving any other of the rents and sums of money and revenues aforesaid, or in receiving any fine or fines, sum or sums of money payable or which shall or may become payable, for or in respect of any lease or leases to be granted by the said defendant of any such lands or hereditaments aforesaid, or from or in receiving all or any of the issues, profits, sum and sums of money, arising and issuing, or which shall or may arise or issue, from all or any of such lands or hereditaments aforesaid ; and that the said defendant may also in the meantime be restrained in like manner from making, granting, or executing, and from putting or causing to be put his episcopal seal to any leases or lease by way of renewal or otherwise, of any such lands or hereditaments as aforesaid, which shall have been prepared by any other person than the plaintiff ; and that for the purposes aforesaid all proper and necessary directions may be given.

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The cause now came on for hearing.

The *Solicitor-General*, Mr. *Bethell* and Mr. *Lloyd*, for the plaintiff.

Mr. *Swanston*, Mr. *Kenyon Parker*, and Mr. *Faber*, for the defendant.

The plaintiff entered into evidence at considerable length. The most important documentary evidence was as follows; Ancient Bishops' Registers, from which it appeared that the office of receiver was exercised in 1445. Copy of a patent of 1601, from the bishops Muniment Room, in the same language generally as the plaintiff's, but not requiring the receiver's deputy to be approved by the bishop. Several patent books marked P. 1, P. 2, P. 3, hereafter more particularly referred to. Old lease books from which it appeared that, between 1601 and 1748, the leases of the see had been frequently attested by the receiver (in many *instances, however, the attestation [*257] taking place before the appointment of the party as receiver.) Bond of 1688, executed by Thomas Newcome, then receiver, by which he gives up his right as receiver to prepare the leases, and receive the fees for so doing. Leases of 1791, containing a clause of re-entry by the bishop and his successors on the lessee assigning his lease, and failing within six months afterwards to leave the assignment with the receiver-general to be entered at his office. Various leases, cash accounts, letters, &c.

The parol evidence was principally in support of those allegations of the bill which related to the preparing of leases and surrenders, &c., and the receipt of fees.

It appeared, both from the documentary and parol evidence, that for some years before the plaintiff was appointed receiver (including the period during which his predecessor held the office,) the same person who received the rents, transacted the business of the see relating to the renewal and preparing of leases, &c.

Upon the opening of the parol evidence,

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Mr. *Swanston* objected generally to its admissibility, on the ground that it was tendered, first, to prove the antiquity of the office, and secondly, to give a construction to the patent, and to extend the rights and obligations of the officer under that patent.

THE VICE-CHANCELLOR reserved his judgment on the objection.

In order to prove that it had been the custom for the receiver for the time being to prepare the patents or appointments to offices of the see, and incidentally to show the names of former receivers, who had been attesting witnesses to many of the leases, the plaintiff's counsel tendered, as secondary evidence, certain documents purporting to be copies of patents, of dates [*258] commencing in "the year 1665. These copies were entered in books marked respectively P. 1, P. 2, and P. 3, all of which came out of the plaintiff's custody. They were said, by the plaintiff's witnesses, to have been usually called "patent books." The witnesses, two of whom had been clerks of the plaintiff, and the third, named Dunster, a clerk both of the plaintiff and his predecessor in office, Mr. Andree, stated it to have been the usual practice of the receiver, and, as they believed, his duty in that character, to enter or cause to be entered in these books, copies of such patents or appointments; that such copies were made for the purpose of preparing similar patents or appointments when necessary, and that many of the later entries were in their, the witnesses', handwriting. Dunster further stated, that books P. 1 and P. 2 were in Andree's office at the time of his death, and, upon that event happening, came into the possession of the plaintiff.

Mr. *Swanston* objected to the reception of this evidence, observing, 1st, that the books came out of the wrong custody; and 2ndly, that if it was the duty of the receiver, as agent of the bishop, to make the entries, they could not, as between him and his principal, be admitted in evidence against the principal; such entries being, in truth, declarations made not against the agent's

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own interest. [The *Vice-Chancellor*.—If it be proved to have been the receiver's duty to make the entries, might they not be evidence against all the world? *Doe d. Patteshall v. Turford*,^(a) *Ward v. Garnons*.^(b)] Admitting that to be so, there is no proof on the subject.

The *Solicitor-General*, *contra*.—First, the evidence shows that the books are in the hands of the proper officer. It is proved to have been the practice for the receiver for the time being to make copies of these instruments "for a particular [*259] purpose, and to enter those copies in certain books. His, therefore, is the proper custody of the books containing the entries. It is not necessary to show it to have been his duty to make these entries: it is sufficient to show the practice. Two of the books have been traced into the hands of the present receiver from those of his predecessor. It can make no difference that the proper custody happens to be that of the plaintiff in the suit; and even if the plaintiff's be not the most proper custody, it is, under the circumstances, the most reasonable and natural custody, and that is sufficient: *Bullen v. Michel*,^(c) *Bishop of Meath v. Marquis of Winchester*.^(d) Secondly, all writings of deceased persons made in the usual course of business, and whether against their interest or not, are admissible in evidence to prove contemporaneous facts: 1 Phil. Ev. 318; *Doe v. Turford*, *Smartle v. Williams*,^(e) *Poole v. Dicus*,^(f) *Ward v. Garnons*. [The *Vice-Chancellor* referred to *Barker v. Ray*.^(g)]

Mr. *Swanston*, in his reply upon the second point, commented on the observations of Lord Eldon in *Barker v. Ray*.^(h) He also referred to *Marks v. Lahee*.⁽ⁱ⁾

THE VICE-CHANCELLOR received the evidence *de bene esse*. In the course of the argument his Honor remarked, that, in *Ward v. Garnons*, *Doe v. Turford*, and other cases of that class, the evidence which had been treated as admissible, might be

(a) 3 B. & Ad. 890.

(b) 17 Ves. 134.

(c) 2 Price, 412.

(d) 4 Cl. & Fin. 540, "It is not necessary" &c.

(e) B. N. P. 263.

(f) 1 New Ca. 649; 1 Scott, 600.

(g) 2 Russ. 63.

(h) Page 76.

(i) 2 New Ca. 408; 4 Scott, 137.

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considered rather as evidence of acts done than of declarations.(a)

[*260] *Upon the merits of the cause,—

For the plaintiff, it was argued, first, that the office of receiver is an immemorial office. The existence of it before the restraining statute(b) will be presumed from the regular uninterrupted succession of officers since that time. The grant of it, therefore, by the former bishop is binding on his successors: *Trelawny v. Bishop of Winchester*.(c) Secondly, the general words of the grant, which is in the ancient form, coupled with the evidence of usage under the grant, are sufficient to support the plaintiff's claim: *Chad v. Tilsed*.(d) As to the usage, we have the evidence of living witnesses for the space of 60 years. Such evidence in the language of Dallas, C. J., "is evidence whence usage anterior to that time may be presumed: and such a length of modern usage connected with the ancient usage affords the strongest exposition of the meaning of the original grant." Here every part of the evidence tends to show that the receiver was the person who prepared the leases. The attestation by him of several of the older leases, the condition of re-entry in the lease of 1791, and Newcombe's bond, are strong evidence on the subject. It is not necessary that the grant of an office should specify all the rights, duties, and incidents of it. Many duties are incidental to an office which are not specified in the grant; as in the case of the Master of the Rolls, the Chief Justice of the Common Pleas, and the Marshal of the King's Bench: *Harding v.*

Pollock;(e) *Snow v. Firebrass*.(f) The grant of an [*261] office passes all the incidents *of it, including the fees:

(a) The reporter takes this opportunity of correcting an error, which appears in the first marginal note to the case of *Clark v. Wilmot*, ante, Vol. I. p. 53. In *Moore v. Dearden*, M. T. 1842, the Vice-Chancellor, *Knight Bruce*, after noticing the error, said, that, in *Clark v. Wilmot*, he received the evidence of the entries, on the ground that, upon the whole, they were against the interest of the party who made them, and that the mere circumstance of some portion of them being in the party's favor would not render the evidence inadmissible.

(b) 1 Eliz. c. 19. (c) 1 Burr. 219. (d) 2 Brod. & Bing. 403; 5 B. Moore, 165

(e) 6 Bing. 25. (f) 2 Salk. 439.

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Webb's case(a); Co. Litt. 121. b., 307, a.; Litt. sect. 378; and parol evidence is admissible to show what is incidental to it: 2 Inst. 282. Moreover, the exclusive right of making the leases of the see is a reasonable incident to the office, and reasonably to be rewarded: *Rex v. Rigge*,(b) *Regina v. Lord of the Manor of Bishop's Stoke*;(c) and the fees being incidental to the office, the grantor cannot, upon the payment of a certain fee, discharge the party from his service and attendance. Co. Litt. 233, b.

Lastly, the plaintiff cannot obtain adequate remedy at law. There is no proceeding at law by which he could be quieted in the possession of the office. He might, it is true, bring an action for damages for disturbance, but that remedy would only be available in each particular case of disturbance.

For the defendant.—The foundation of the plaintiff's case is the patent, by which he says that he has acquired certain rights. Looking at the patent only, without reference to the parol evidence, nothing can be more clear than that the demands of the plaintiff are not warranted by the terms of it. But it is said that it may be explained by parol evidence of usage. What ground however is there for dispensing with the ordinary rules of evidence? In *Chad v. Tilsed*, the Court, as Park, J., observed, was driven to receive evidence of usage by the generality of the terms of the instrument. That case shows that extreme generality in the wording of an ancient instrument may be a ground for letting in parol evidence of usage under it. In some cases ambiguity in the instrument seems to have had the same effect: *Wadley v. Bayliss*.(d) But here the attempt of the plaintiff is totally at variance with these distinctions; [*262] it is an attempt to introduce evidence of usage in contradiction to the terms of the instrument; which cannot be done: *Rex v. Salway*.(e) The difference in the nature of the office, as it appears in the patent and as it is described in the parol evidence, is remarkable. *Ex fucie* the patent, the Bishop might

(a) 8 Rep. 49 b.

(b) 2 B. & Ad. 550.

(c) 5 Dowl. P. C. 608

(d) 5 Taunt. 752.

(e) 9 B. & C. 424.

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discharge the duties of it himself. But the duties which are claimed to belong to the office could not be discharged by him personally. According therefore to the argument on the other side, the incident would be larger than the principal, and the office virtually changed. The word "office" cannot have any meaning attributed to it which is inconsistent with the other words of the grant: *Attorney-General v. Shore*.^(a) Besides, admitting that the various acts have been done which are alleged to have been done by the receiver, there is no evidence whatever that they were done in the character of receiver. To say that they were so done is to assume the whole question. The Court will not unnecessarily enlarge the terms of the grant: *Bishop of Chester v. Freeland*.^(b)

Supposing that the plaintiff can establish his legal title, there are, nevertheless, authorities to show that the defendant may discharge him from the office with or without compensation. *Vin. Abr., Officers*, (O. 4.) [*The Vice-Chancellor*, as to this point, referred to *Bro. Office*, pl. 29, and also suggested it as a question possibly worthy of consideration whether the plaintiff could or could not resign his office without the consent of the bishop.] If the bishop cannot prevent him from resigning, he can have no right to compel the bishop to keep him. But whatever rights he may have in this respect, a court of equity will not, under the circumstances of this case, interfere in his behalf. He asks specific performance of an old contract under circumstances entirely new, the intent and spirit of the original [*263] *contract being entirely gone. The effect of carrying it into execution would be to impose upon the bishop the services of a person who is entirely a stranger to him, and in whom therefore he can have no confidence. Under such circumstances, the principles laid down by Lord Eldon in *The Duke of Bedford v. The Trustees of the British Museum*^(c) apply, and the party must be left to his remedy at law. The grant raises no continuing trust in his favor: *Shaw v. Lawless*.^(d)

The *Solicitor-General* in reply.—In every case of an ancient

(a) 11 Sim. 616.

(b) Ley, 75.

(c) 2 Myl. & K. 552.

(d) L. & G. t. Plunk. 558.

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office the duties must be proved by parol; no grant of such an office ever included in it all the duties, nor are the profits or avails specified in the grant. In construing a grant of franchise parol evidence is ordinarily applied. Here the evidence is of the strongest nature to support the plaintiff's legal right.

Assuming that he has established his legal right, will not this Court assist him in the protection of it? The plaintiff's possession is since 1801. If the Court will not protect him he must bring his action upon every lease. [The *Vice-Chancellor*.—Unless he could obtain a mandamus.] Where a party is wrongfully removed from his office, a mandamus will lie: but not where there is a mere disturbance in the receipt of the profits of the office. Besides, the damage might still accrue, notwithstanding the mandamus. The opposing party might still persist in preparing lease after lease. In the case of a patent, this Court protects the party in the exercise of his legal rights; and there are cases where the monopolies of Oxford and Cambridge, and of the East India Company, have been protected by this Court. The plaintiff does not ask for specific performance, but prevention from disturbance by any party.

*At the close of the argument, Mr. *Swanston* mentioned the following authorities upon the question whether the plaintiff could or could not resign without the consent of the bishop: *Bro. Grants*, pl. 134; *Com. Dig., Surrender*; *Howard's case*; (a) *Rex v. Kemp*; (b) *Rex v. Patterson*. (c)

April 7th.—THE VICE-CHANCELLOR.—In the view which I take of the equity of this case, it is unnecessary to decide the merely legal points that arise upon it. And, in particular, as to the evidence tendered on the part of the plaintiff, which, the defendant having objected to its admission, has been received *de bene esse*, but, nevertheless, considered by me—finding that, whether it ought to be wholly or partially rejected, or wholly or partially admitted, my conclusion upon the case must be the same—I leave that point open, giving no opinion upon it. I as-

(a) Cro. Car. 59; Sir W. Jones, 293.

(b) 2 Salk. 465; Holt, 420.

(c) 4 B. & Ad. 26.

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sume for the present purpose, but without deciding, that the grant or patent of 1801 is binding upon the defendant, that the rights, duties, and functions, which the plaintiff contends to belong or be incident to the office so granted, do, in fact, belong, or are in fact incident, to it, legally, as against the defendant, and that some part at least, if not the whole, of those rights, duties, and functions, is of such a kind or attended with such incidents or consequences, that at law the defendant, though making or causing to be made some or any pecuniary payment to the plaintiff, has not and cannot upon that condition acquire a legal title to prohibit or exclude the plaintiff from the actual exercise of those rights, duties, and functions, or part of them, notwithstanding the principle recognized in the cases collected in *Viner's Abr. tit. "Officers and Offices,"* O. 4, some of which were mentioned in the course of the argument. Whatever may be the law upon either of these points, as to which I desire to be understood as not *expressing or intimating any opinion, the equity between the parties upon the present record is in my judgment the same. With regard, also, to another legal question that I suggested as possibly material, and as to which Mr. *Swanston* referred to *Bro. tit. Grants*, 134—the question, namely, whether it is legally competent to the plaintiff to resign his office without the consent of the Bishop of Ely for the time being,—I abstain from giving any opinion. But I may repeat, in passing, that if it is so, the existence of such a right or power ought probably not to be without considerable bearing upon the equity between the parties.

The plaintiff puts his case upon a legal title to an office, which he says is vested in him, and upon a disturbance of him, by the defendant in the enjoyment of what the plaintiff asserts to be the legal rights belonging to that office, either carried into effect or avowedly intended. Some legal remedy or legal remedies for such a disturbance there must of course be: this is not questioned. But the plaintiff must be understood as asserting the insufficiency of any remedies merely legal, and calls upon this Court to interfere by way of declaration and injunction for his protection accordingly; not asking any account against the defendant, or the performance of any act by him. The prayer of the bill is

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this : [His Honor here read the prayer as before stated.] Now such a case is, I apprehend, one in which the court, before interfering ought to be well satisfied that the ordinary course of law, of legal remedies, is insufficient to do the plaintiff complete justice. Of this, however, I am not sure that at present I am entirely satisfied ; more especially as the duties, acts or services, of which the plaintiff's whole object is to be protected in the performance, can upon his own showing be regarded as valuable to him so far only as he may earn money by their performance—so far only as their performance gives, or may give, him a title to demand certain pecuniary fees. I do not, however, place my decision on the ground of the sufficiency of the plaintiff's legal remedies—a ground *with reference to which [*266] the arguments of his counsel, founded on the doctrine of this Court as to preventing a multiplicity of suits, and the vexatious repetition of litigation, and on what they contend to be the rules and course of the common law, may deserve much consideration ; but seeing on one hand, a case in which Mr. Pickering, if wrongfully disturbed or wrongfully impeded by the bishop, may recover substantial damages at law against him for the injury, whether there is or is not any other legal remedy ; and being of opinion, on the other hand, that the alleged rights of the plaintiff, in the breadth and length in which he asserts and claims and seeks to be protected in them, are of a nature neither usual nor convenient, nor without hardship or pressure on the bishop, I consider it more fit for a court of equity to leave the plaintiff to obtain redress by damages or otherwise in a court of law than to exercise its peculiar jurisdiction by compelling the bishop specifically to submit to the practical exercise of such rights, if rights they are. Whether this Court would or would not act in the manner sought by the plaintiff between a mere steward of a manor holding for life and the lord, their connection is materially different from that of which the plaintiff desires compulsorily to establish the existence or continuance between him and the defendant.

The duties and services which the plaintiff claims a right to perform appear by his bill to be these:—[His Honor here read the allegations of the bill as before stated, beginning at the as-

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terisk.] The leases which Mr. Pickering claims a right to prepare, as well as engross, being all the leases that may be granted by way of renewal "or otherwise," by the Bishops of Ely of lands and hereditaments belonging to the see; there being claimed, too, such a right of access to the Muniment Room in the bishop's residence as this bill alleges; and the closest knowledge of all his temporal concerns connected with his see being the necessary consequence of what the plaintiff asserts, it is obvious that it is of the highest importance to the [*267] *safety of the temporal interests of the bishop for the time being, and his ordinary comfort, that the person invested with such powers should be a man not merely respected by him, not merely worthy of trust, but also personally acceptable to him. To force upon him in such characters a person however estimable, however professionally eminent, who is objectionable to him, or in whom he does not happen to confide, would, if legal, be surely hard; and sitting in a court of equity, I do not feel any inclination to do it. Neither, however, do I proceed on this ground solely. There is another equitable consideration of importance as it seems to me—and that is, the absence of mutuality. The relief sought by the plaintiff under the grant of 1801, is analogous to the specific performance of an agreement. If not in all respects, at least the analogy holds, I apprehend, as to the question of mutuality; the general rule of the Court as to which depends upon principles the most familiar and the most universally recognized—principles in support or proof of which the repeatedly declared opinion of Lord *Redesdale* in the House of Lords and elsewhere, the case of *Flight v. Bolland*,^(a) and the various other authorities on the subject, both elder and later, need not be cited. If, therefore, the bishop could not, as plaintiff, compel Mr. Pickering to perform specifically those duties and services which he is seeking to compel the bishop to permit him specifically to perform, the Court ought not, I apprehend, to aid Mr. Pickering for such a purpose. But the very nature of those duties and services, as asserted by the plaintiff, seems to me such as to preclude the possibility of a decree

(a) 4 Russ. 298.

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in this Court against him, compelling their performance. The authorities on this subject are not confined to *Clarke v. Price* before Lord *Eldon*, reported by Mr. *John Wilson*,^(a) and the cases of the same class before Sir *Lancelot Shadwell*, some of *which are reported by Mr. *Simons*.^(b) Think- [268] ing that the bishop suing Mr. *Pickering* in this Court, for the purpose of compelling him to perform those duties and services, would be refused relief, I am upon this and the other ground to which I have just referred, of opinion, that, whatever may be the merely legal view of the questions which I have mentioned, this Court can, upon the present record, do nothing for the plaintiff.

Dismissing the bill, I do so without costs, and without prejudice to any action, or to any application for a writ of mandamus, that may be brought or made by or against either party.

 JOHNSON V. BOURNE.

1843: April 24th.

A person having purchased an estate for the purpose of building upon it, mortgaged it to a Joint Stock Banking Company with whom he dealt, to secure sums then due, and all sums thereafter to become due from him to them, on any banking or other account whatever, "so as the whole amount of principal monies to be ultimately recovered or recoverable by virtue of that security, should not exceed the sum of £5800, together with interest." By the mortgage-deed a power of sale was given to the company. The mortgagor built three houses on the land, which were successively sold to different purchasers. The purchase-mones were not paid to the mortgagor, but to the company, who gave the mortgagor credit for them in his account:—*Held*, that these sums were recovered by the company by virtue of the mortgage security, and, so far as they were applicable as principal monies, must be considered as received by them in discharge of the sum of £5800, and not merely on the general account between them and the mortgagor.

A. mortgages an estate to B., to secure future advances. He then mortgages the same property to C., who gives notice of his security to B. *Quære*, whether the rights of B. under his mortgage security are affected by the transaction between A. and C.?

(a) 2 J. Wils. 157. See *Salisbury v. Hatcher*, ante, p. 54.

(b) Probably *Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, Id. 340, and *Baldwin v. Society for the Diffusion of Useful Knowledge*, 9 Sim. 393, are here referred to.

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PREVIOUSLY to May, 1837, William Alexander Smith contracted with Edward and John Falkener, the devisees in trust under the will of Edward Falkener deceased for the purchase of the fee simple of certain copyhold land held of the manor of West Derby, in the county of Lancaster; he afterwards contracted to sell part of this land to Hugh Gore for building purposes. Gore being considered indebted to the Liverpool [*269] Banking Company agreed *to execute to them a mortgage of the land which he had so contracted to purchase. Accordingly, by an indenture dated the 10th May, 1837, and made between certain persons who had been incumbrancers, but whose incumbrances were paid off, of the first and second part, Edward and John Falkener of the third part, Smith of the fourth part, Gore of the fifth part, and Timothy Bourne and Alfred W. Powles, trustees of the Liverpool Banking Company of the sixth part, after reciting the facts before stated, and that Gore was erecting three dwelling-houses on the said piece of land; and further reciting, that the said Hugh Gore was indebted to said Liverpool Banking Company in the sum of £2167, and that he had applied to said bank to lend and advance the further sums of money therein expressed; and further reciting, that it had been agreed, that, in order to secure such monies as were then due and owing, and as should from time to time thereafter become and be due or owing from the said Hugh Gore, his executors or administrators, to the company, and notwithstanding any change in the said company, on the balance of account or otherwise, subject to the limitation in amount thereafter mentioned, all that piece of land so contracted to be sold to the said Hugh Gore, together with the dwelling-houses and other buildings then erected or in the course of erection thereon, should be surrendered to the use of the said Timothy Bourne and Alfred W. Powles, (trustees as aforesaid,) their heirs and assigns, upon the trusts thereafter mentioned: it was witnessed that, for the considerations therein mentioned, the several parties thereto of the first, second, third, fourth, and fifth parts respectively covenanted to surrender the said piece of land (by its proper description,) together with the dwelling houses and other buildings thereon, to the use of the said Timothy Bourne and Alfred

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William Powles, their heirs and assigns, upon the trusts therein-after expressed ; and it was thereby agreed and declared, *and particularly the said Hugh Gore did thereby direct [*270] and appoint, that the said Timothy Bourne and Alfred W. Powles, their heirs and assigns, should be seised and possessed of and interested in said hereditaments thereby covenanted to be surrendered with the appurtenances, to the intent and upon trust that the same should be a continual and running security to the said company as a fluctuating body, and notwithstanding any and every change in the company, for the due payment and reimbursement to them (subject nevertheless to the limitation in amount hereinafter expressed,) in the first place of the costs, charges and payments therein mentioned, and in the next place of all and every sums and sum of money which then were or at any time thereafter might become due or owing from the said Hugh Gore, his executors or administrators, to the said company, constituted as aforesaid, in any of the ways or modes, or on any of the accounts therein particularly mentioned, or in any other mode or any other account in the usual way of banking business, or otherwise howsoever, *so as the whole amount of principal monies to be ultimately recovered or recoverable by virtue of that security should not exceed the sum of £5800, together also with interest after the rate of £5 per cent. per annum* for all such monies respectively from the respective days whereon they should be so advanced, paid, expended, earned, or incurred, or become due and owing, or from such other times and in such other manner as were usual amongst bankers, and thenceforth until payment thereof respectively.

The deed then contained a power for the said Timothy Bourne and Alfred W. Powles, and the survivor of them, and his heirs, or their or his assigns, of their or his own authority, at any time or times when they or he might think proper, and without any further consent or concurrence of said Hugh Gore, his heirs, executors, administrators, or assigns, absolutely to sell and *dispose of the said hereditaments in manner therein [*271] mentioned. And it was thereby declared and agreed that said Timothy Bourne and Alfred William Powles, or the survivor of them, his heirs, or their or his assigns, with and out

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of the monies produced by such sale or sales, and such clear rents and profits (if any) of the said hereditaments as should actually come to their or his hands previously to such sale or sales taking place, should pay and discharge the expenses, costs, and disbursements therein mentioned, and in the next place pay, satisfy, and discharge unto the company, constituted as aforesaid, all such sums or sum of money as should be then due or owing to them from the said Hugh Gore, his executors or administrators on any such of the several accounts, for any such of the several causes, in any such of the several ways, or by reason of any such of the several matters and things, and whether for principal monies, interest, charges, or otherwise, as thereinbefore in that behalf were severally specified, declared, or intended ; *provided nevertheless, that the principal monies to be ultimately recoverable by means of the security thereby made, exclusively of any sum or sums of money to be paid or advanced for the insurance from fire of the messuages or dwelling-houses and other buildings of the said hereditaments, should not exceed the sum of £5800 ;* and should pay any surplus of the said trust monies unto the said Hugh Gore, his heirs, executors, administrators, or assigns, for his and their own benefit ; and should, when all the purposes of the said security were satisfied, re-surrender the said hereditaments, or such part thereof as should remain unsold, with the appurtenances, to the use of the said Hugh Gore, his heirs and assigns.

The premises comprised in this deed were duly surrendered to the use of Bourne and Powles and their heirs, and they were admitted tenants, according to the custom of the manor.

Gore afterwards completed the building of the three [*272] *messuages mentioned in the indenture. They were respectively completed in November, 1837, June, 1839, and March, 1840, and were immediately sold to different persons for the respective sums of £1850, £2000, and £2100. These sums were on each occasion received from the purchaser by the bank, through their manager, and were applied, as the bank admitted, in reduction of the debt due and owing to them from Gore. The sums were also entered in the books to the credit of Gore, though, as the bank stated, not to the credit of

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his separate account with them, but to the credit of a joint account which they had with Smith and Gore. That account, however, originated in the debt of £2167, mentioned in the indenture of the 10th May, 1837, in which debt Smith was collaterally concerned.

At the end of the year 1837, after the first house had been sold, Gore, being indebted to the plaintiff in a sum of £560 for timber, and having requested a further supply, the plaintiff, considering that by means of the sum of £1850, which the bank had then lately received, the debt due to them from Gore was reduced, acceded to Gore's request, upon having the value of such further supply of timber, together with the sum of £560, secured to him by a second mortgage of such parts of the copyhold premises as then remained unsold; the whole amount to be secured not to exceed the sum of £1000. This arrangement was carried into effect by an indenture dated the 1st January, 1838, and made between the plaintiff, of the one part, and Gore, of the other part; and, on the 4th January, a notice in writing of the execution and contents of that indenture was served on Bourne and Powles, by the plaintiff's solicitors.

In 1840, after the last house had been sold, the plaintiff made various applications, and ultimately, on the 31st August in that year, sent a formal letter through his solicitors to the banking company, requesting them, as *first mortgagees, [*273] to come to an account with him in respect of what might be due to them on their mortgage security, observing, that the sum to be ultimately recovered or recoverable by virtue of their security did not exceed the sum of £5800, but that he was willing to account with them, on the principle of applying the sum of £5950, which they had received from the sale of the houses, in satisfaction of the principal sum of £5800, secured by the deed of May, 1837, together with interest and charges.

In reply to this application, the solicitor of the company wrote to the solicitors of the plaintiff as follows:—"Permit me to remind you that, as long ago as last May, I informed your Mr. Morecroft, that the balance then owing to the Liverpool Banking Company from Hugh Gore was 1128*l.* 15*s.* 1*d.*, exclusive of about

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six months' interest, bank commission and some trifling charges, and which is secured by the said deed of mortgage dated on or about the 10th day of May, 1837, and the surrender to Mr. Timothy Bourne and Mr. Alfred William Powles on behalf of the said company. Allow me to mention that there will also be some further interest to be added to that balance, and that the said company intend to insist on and enforce their security, right, and title upon and to the unsold lands and premises comprised in the said deed and surrender for the balance owing by Hugh Gore to the said company, and I beg to decline any discussion respecting it except upon the above principle."

The bill which was filed against Bourne, Powels, and Gore (the former being made a defendant in his character of registered public officer of the bank, as well as trustee,) charged that the company were not entitled to have any debt which might be due to them on Gore's general banking account secured upon the unsold copyhold premises, but only such principal monies as were recoverable under the deed of May, 1837, to the [*274] extent therein mentioned, "and that the company had in fact, by the exercise of the power of sale comprised in that deed (Gore not having been the vendor, or received the purchase-mones for the houses,) received all the principal monies which were secured by the deed.

The bill prayed a declaration that the defendants, as trustees for the banking company, were not entitled by virtue of the indenture of the 10th May, 1837, to recover or receive any larger or further sum out of the mortgaged premises than £5800, together with monies spent for insurance against fire; that an account might be taken of what, if anything, was due to them on their security, charging them with the several sums of £1850, £2000, and £2100; that if anything was overpaid to them they might be charged with all sums so over paid to them with interest, and that if anything should be found due to them, the plaintiff might be at liberty to redeem them, &c. &c.

The defendants, by their answer, insisted that it was intended that their mortgage should operate as a continuing security for a floating balance so that any balance which, at any time, might be due and owing to the company from Gore, while the ac-

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count between the company and himself existed open and unsettled, should be recoverable thereunder, subject to a limitation in point of amount for the purpose of regulating the stamp to be placed on the mortgage, which limitation it was agreed should be the sum of £5800. They admitted that Gore did not receive the purchase-monies for the houses, but they stated that he negotiated for the sale of them, and that no contracts were entered into between the defendants and the purchasers; and that, except in joining in the surrender to the purchasers, the defendants had not exercised the power of sale contained in the indenture of May, 1837.

The defendants also, by their answer, stated that, after the execution of the deed of May, 1838, and previously to the receipt of each of the before-mentioned sums of money *for [275] the houses, they had made large advances to Gore on his banking account, large portions of which were employed, or professed to be employed, by him in the completion of the houses; and that, though the plaintiff had notice after the 4th January, 1838, that the company were assisting Gore with these advances, he nevertheless did not object to such advances, but acquiesced in them.

Mr. *Anderdon* (with whom was Mr. *Rolt*.) for the plaintiff, contended that it was at least doubtful whether the defendants were entitled as against the plaintiff to be allowed for any advances made by them after notice of the plaintiff's mortgage; but that at all events, according to the true construction of the deed of May, 1837, the defendants' mortgage security was discharged by the payment of the three several sums of £1850, £2000, and £2100.

Mr. *Russell* and Mr. *Hislop Clarke*, for the defendants, Bourne and Powles.—The defendants' security was prepared according to the approved form. It was considered that these parties were dealing on a running account; and the result of the account, whatever it might happen to be at any time, provided it did not exceed a certain limit, was to be the sum recoverable by the indenture. What might be done in the interim was not regarded, provided the result of the account was recoverable.

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Now, here the three sums received were not received specially in reduction of the mortgage; whatever therefore was due beyond them, though matter of general account, was properly the subject of the security. But, even supposing the defendants' security to have been exhausted by these payments, the sums advanced by them, with the acquiescence of the plaintiff, for the building and repairs on the premises must be allowed them in account. As to what has been said respecting advances made by the defendants after notice of the plaintiff's mortgage, [276] the *decision of Lord Cowper, in *Gordon v. Graham*,^(a) is in point. The inquiry directed in that case as to subsequent advances, which was obtained "upon the importunity of the counsel," seems useless, as the decree is complete without it.^(b) And see Mr. *Sweet's* edition of *Jarman's Conveyancing*.^(c)

Mr. *Blunt* for the defendant Gore.

Mr. *Anderdon*, in reply, contended, that the construction put by the defendants upon the deed of May, 1837, tended to the destruction of their own security by showing an evasion of the stamp laws.

THE VICE-CHANCELLOR.—My impression on that part of the case which alone the plaintiff comes here to contest is this: that,

(a) 7 Vin. Abr. 52, pl. 3; 2 Eq. Ca. Abr. 598.

(b) "It is by the consent of the defendant Graham ordered and decreed, that the said estate by him purchased of the said Sir Richard Hutchinson, be sold to the best purchaser, &c., and out of the money arising by such sale the defendant Turner is to be paid his debt in the first place; and for that purpose the said Master is to see what is due to him as advanced or lent on the credit of the said mortgage; and if he shall find any monies advanced by the said Turner on the credit of the said mortgage, after the 25th of August, 1713, he is to state the same specially; and the said Master is to tax the defendant Turner his costs of this suit; and after the defendant Turner shall be satisfied what shall be so certified due to him for principal, interest, and costs, then the defendant Montgomery is in the next place to be paid his principal sum of £300, with interest, together with his costs of this suit, to be computed and taxed by the said Master out of the said money arising by such sale of the premises, &c." R. L. 715, A. fo. 341.

(c) Vol. 5, p. 443.

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upon the words "principal monies to be ultimately recoverable by means of this security," I must hold, that any principal money, or payment on account of principal money, or applicable as principal money, which was received by the mortgagees by means or virtue of the security, whensoever received, must be applied to cut down and reduce the £5800.

*The next question is, whether it appears conclusively [*277] upon the materials before me that any sums have been received for principal money, or applicable as principal money, by means or virtue of the security. Now, it does not certainly appear that the whole of the three sums in question has been so received, but there is so high a degree of probability that some portion of them was so received, that I think I may take that for granted. These sums were received from the purchasers of parts of the property : in two instances upon sales made by the mortgagees under their power of sale ; in the third instance upon a sale expressed to be made by the mortgagor, with the mortgagees' concurrence, on the terms of receiving the purchase-money in part reduction of their mortgage debt.

Now, it seems difficult to say, that these sums were received otherwise than by means or virtue of the security. Gore, the mortgagor, is not allowed to receive them. The mortgagees stand between him and the purchaser, and take the money immediately out of the purchaser's hands. Is it possible to say that they do not get it by means or virtue of the security? If indeed they had merely joined in the conveyance to the purchaser for the purpose of assurance, and being not unwilling that their security should be diminished, and having confidence in the mortgagor, they had allowed him to receive the money, then, though he had paid it the next hour into the bank, they would not have received it by means or virtue of the security, but by the voluntary payment of the mortgagor. But here they will not let the mortgagor receive—they will not let their security be reduced without a corresponding payment. The consequence is, that they directly and immediately make their security available for the payment of their debt *pro tanto*.

THE plaintiff undertaking to waive any question as to the right of the banking company to charge as against the plaintiff, by virtue of the mortgage-deed of the

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10th day of May, 1837, any advances made by them to the defendant, Hugh Gore, after receipt of the notice of the 4th January, 1838, and the defendants Timothy Bourne and Alfred William Powles undertaking not to appeal from this decree,^(a) declare that the principal sum of £5800, to which the security of the banking company in the pleadings mentioned was limited by the mortgage of the 10th day of May, 1837, was satisfied, or reduced by the payment to the said banking company of the several sums of £1850, £2000, and £2100, in the pleadings mentioned, so far as the same several sums, or any of them, were at the respective times of the payment thereof, or are now, properly applicable to the payment of principal money merely, due at the respective times of such payment from the defendant Hugh Gore to the said banking company, or any part of such money, other than monies paid for insurances of the premises from fire. Refer it to the Master to take an account of what is due to the said banking company from the defendant Hugh Gore on the said security, having regard to the proviso limiting the said security to £5900, and to the above declaration in reference thereto, and having regard also to the receipt of the said sums of £1850, £2000, and £2100, by the said banking company on account of the said security, and to the respective times at which the said several sums were respectively received; and, upon the request of the defendants, Timothy Bourne and Alfred William Powles, let the Master inquire whether any and what sums have been properly expended by the said banking company on the property comprised in their said security, or any and what part thereof, and in what manner, and for what purposes and under what circumstances; and at the like request let the Master also inquire whether any and what sums have been expended on the said premises by the said banking company by which the value of the property has been increased, and in what manner and for what purpose and under what circumstances. Such inquiries to be without prejudices to any question of law or equity. &c, &c.

(a) The prefatory words were added by the parties after the Vice-Chancellor had delivered the minutes.

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*PARKER V. MARCHANT.

1843: March 6th, 7th.

Under a devise of testator's messuages, lands, tenements, and real estate:—*Held*, that chattel leaseholds of which he was possessed at the time of making his will and at his death did not pass.

ROBERT PARKER, by his will, after bequeathing various pecuniary legacies, and giving to his brother-in-law Sir Timothy Shelley, Bart., and Sir John Shelley Sidney Bart., all the rest and residue of his ready money, securities for money, and monies in the funds, in trust to invest the same in their joint names for the benefit of his wife for her life, and after her decease for the

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benefit of his cousins Thomas Marchant and John Marchant, the children of his late cousin William Marchant, and the children of his late cousin Mary Knight, in equal shares, in the manner stated in the former report of this case,^(a) proceeded in the following terms:—"The share of such child or children as shall be under the age of twenty-one years, when the same shall become transmissible by the decease of my said dear wife, shall be paid into the hands of the natural parent, or next of kin, or guardian appointed, as the case may be; and I do direct that the receipt or release of each of the said parties, children, parents, or others *respectively, shall be a sufficient discharge to my said trustees for such share or shares respectively, and that they shall not be accountable for any more of my personal estate than shall come to their respective hands. As to my messuages, lands, tenements, and real estate, I do dispose thereof as follows:—I give and devise unto the said Sir Timothy Shelley and Sir John Shelley Sidney and their heirs all those," &c. [Here followed an enumeration of various messuages and lands: see *ante*, vol. 1, p. 291.]

The messuages and lands enumerated in the will being all of freehold or copyhold tenure, and the testator having been possessed at the date of his will of certain leasehold estates held for years, the *Vice-Chancellor* at the hearing of the cause directed a

(a) See *ante*, Vol. I, p. 291. The judgment of the *Vice-Chancellor*, upon the matters there discussed, was affirmed by the *Lord Chancellor* in April, 1843. (See 6 Jurist, 458.) Upon the question so much agitated both at the original hearing and on the appeal, viz. whether a bequest of "ready money" comprehends money at a banker's, the following dialogue from *Malynes's Lex Mercatoria* seems applicable:—

Philomathy.—What things are most requisite in the journal to be noted?

Schoole-partner.—Three notable things are to be noted in the journal:—1. The matter whereof it is made. 2. The form thereof. 3. The office whereunto it is used.

Phil.—Proceed to the explication of the first member.

Scho.—The matter whereof the journal is made may be drawn to five chief branches: for it proceedeth—1. From the inventory; 2. From traffick's continual exercise, &c., &c.

Phil.—Go on with the first branch.

Scho.—A usual inventory generally consisteth in stocks increasing improperly by means of—1. *Ready money*; and that in cash, in *bank*, or both. 2. Wares remaining unsold &c.

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case to be stated for the opinion of a Court of law, upon the question whether the leasehold properties or either and which of them passed under the testator's will to Sir Timothy Shelley and Sir John Shelley Sidney.(a)

It should be here mentioned that in addition to the leasehold property at Brighton referred to in the former report of this case, the testator was at the date of his will possessed of a leasehold house in the Circus at Bath; the particulars relating to which are shortly noticed in the judgment on the present hearing.

The case was argued before the Court of Common Pleas. After argument the learned Judges, *Tindal*, C. J., *Erskine*, J., *Maule*, J., and *Cresswell*, J. certified that neither of the leasehold properties mentioned in the case passed under the will to Sir T. Shelley and J. Shelley Sidney.

The cause now came on for hearing upon the question of the confirmation of the certificate.

Mr. *Lovat*, for the plaintiff.

Mr. *Simpkinson*, Mr. *Bethell*, Mr. *Kenyon Parker*, [231] Mr. **Koe*, Mr. *Wilcock*, Mr. *Hood*, Mr. *Boyle*, Mr. *Stone*, Mr. *Pitman*, Mr. *Whatley*, Mr. *Lewis*, and Mr. *Tripp*, appeared for the several other parties.

It was argued against the certificate, that the words "real estate" must have been intended to comprehend everything in the nature of realty of which the testator was possessed, and therefore leasehold; and in support of this construction reliance was placed on the cases of *Day v. Trig*(b) and *Lane v. Earl Stanhope*.(c) The cases of *Turner v. Husler*.(d) *Lowther v. Cavendish*.(e) and *Addis v. Clement*.(f) were also referred to. It was also contended that the word "heirs" was not used by the testator in its strict technical sense, and might, taking into consideration the whole tenor of the will, be fairly applied to lease-

(a) Ante, Vol. 1, p 311.

(c) 6 T. R. 345.

(e) Ambl. 356; 1 Eden, 99.

(b) 1 P. W. 286.

(d) 1 Bro. C. C. 78.

(f) 2 P. W. 456.

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holds. In *Thompson v. Lawley*(a) and *Pistol d. Randall v. Riccardson*.(b) the limitations could not with any propriety be so applied. The Court would be disposed as far as possible to limit the rule laid down in *Rose v. Bartlett*.(c)

March 7th.—THE VICE-CHANCELLOR.—It has been argued that the testator has given to his wife for her life his leasehold as well as freehold and copyhold estates, including in that gift not only a valuable leasehold estate at Brighton, but also this property, which, if I recollect right, I desired to be inserted in the schedule to the case laid before the Judges as belonging to him at the time of making his will, namely, a house in the Circus at Bath in which he resided part of his life, and which was held by him at rack-rent for a term of twenty-one years from Lady Day, 1818, eleven years of which had elapsed at the date of his will. The contention therefore is, that [*282] a life-estate for the wife was created in this eleven years term at rack-rent—an observation not perhaps of great weight, but which nevertheless suggests itself.

The testator begins the gift with that which seems to me the key of the whole. After closing a perfectly distinct subject he says, "As to my messuages, lands, tenements, and real estate," not saying, "freehold," (he had in fact both freehold and copyhold of inheritance,) but "as to my messuages, lands, tenements, and real estate, I do dispose thereof as follows." Now, it cannot, I think, be very reasonably contended, the words "real estate" being here last, that the words "messuages, lands, tenements" occurring before them, can, upon any principle, independently of *Rose v. Bartlett*, be held to mean or include chattel leaseholds. All that he here describes must I conceive be taken to be real estate, and then he disposes "*thereof* as follows;" that is to say, he disposes of that which he has before said is real estate. Then he goes on and devises to the trustees in the manner which has been stated. The observations of the Judges, particularly Lord Eldon, in the case of *Thompson v. Lawley*.(d) though

(a) 2 B. & P. 303.

(b) 2 P. W. 459, n; 1 H. Bl. 26 n.; 3 Dougl. 361.

(c) Cro. Car. 292.

(d) 2 B. & P. 303.

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that case may be thought different in its circumstances from the present, are not inapplicable to this will. The same remark may be made as to *Arkell v. Fletcher*,^(a) before the present *Vice-Chancellor of England*,—a case deserving attention. Here the use of the word “heirs” without the words “executors and administrators,” the enumeration of particulars that the testator has made, and the omission of any specific mention of the Circus house and Brighton property, seems to me, especially when considered in connection with the rule in *Rose v. Bartlett*, a rule in force for the purpose at least of construing this instrument, to strengthen, if it could be requisite to strengthen, [*283] the *argument against including the chattel leaseholds under the words “and all other my messuages,” and so on ; that is, against holding that these general expressions were meant to be used for any other purpose than that of surely and clearly including all the real estates. On the whole, independently of the great weight belonging to the united opinion of the four learned Judges, whose certificate is before me, I come to the same conclusion as they have done, and cannot refuse to confirm their certificate.

MEMORANDA.

At the end of Hilary Term, 1843, *John Barnard Byles*, Esq. of the Inner Temple, was called to the degree of the coif, and gave rings with the motto “*Metuit secundis*.”

In Easter term, *Digby Caley Wrangham*, Esq., of Gray’s Inn, Serjeant at Law, was appointed one of her Majesty’s Serjeants. At the same time, Sir *Gregory Allnutt Lewin*, Knt., of the Middle Temple ; the Hon. *John Chetwynd Talbot*, of Lincoln’s Inn ; *Samuel Martin*, Esq., of the Middle Temple ; *John*

(a) 10 Sim. 299.

 1843.—Memoranda.

Arthur Roebuck, Esq., of the Inner Temple; and *William Henry Watson*, Esq., of Lincoln's Inn, were appointed her Majesty's counsel.

*HOWELL V. TYLER.

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1843: March 31st.

The costs of a London attorney attending the execution of a commission for the examination of witnesses in the country, may, under special circumstances, be allowed on taxation of costs between party and party.

Under particular circumstances the Court allowed the commissioner a small fee for perusing the pleadings.

THE bill was filed in 1830 against Thomas Tyler, the heir at law of Thomas Tyler the younger, and against Jane Tyler, Morgan Evans, and Mary his wife, who were persons interested in and representing the real and personal estate of Thomas Tyler the younger, praying payment of a sum of £300 bequeathed to them by the will of Thomas Tyler the elder dated 1788, which sum Thomas Tyler the younger, who was executor of Thomas Tyler the elder, was alleged to have retained, upon an agreement under his signature charging his real and personal estate with the payment thereof.

The defendants resisted the plaintiff's bill, on the ground that the estate of Thomas Tyler the elder was insolvent, and that the alleged agreement of Thomas Tyler the younger was not genuine, the signature thereto, purporting to be his signature, being a forgery.

In September, 1841, the defendants employed Messrs. Johnson, Son, and Weatherall, of the Inner Temple, to act as their solicitors in the subsequent defence in this suit. In the same month, the plaintiff's solicitor, who resided at Neath in the county of Glamorgan, one-hundred and ninety-eight miles from London, gave notice to Messrs. Johnson & Co. of his intention to execute the commission issued by him in the cause at Neath.

In consequence of this notice Mr. Weatherall went from Lon-
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don to Neath and attended the execution of the commission ; being absent from London seven days.

The cause came on for hearing on the 2nd December, 1841, when certain inquiries were directed ; and Thomas Tyler the heir admitting the will of Thomas Tyler the younger, the bill was dismissed against him with costs, without prejudice [*285] to the question by whom and out of what fund the costs were ultimately to be paid ; and it was referred to the Master to tax those costs.

The plaintiffs then abandoned the suit and did not draw up the decree.

The defendants' solicitors then carried into the Master's office a bill of costs on behalf of the defendant Thomas Tyler, wherein they charged the sum of 13*l.* 4*s.* for the expenses and journey of Mr. Weatherall to Neath and back, one-third of which was claimed by them as the costs of Thomas Tyler. This claim was opposed by the plaintiffs on the ground that the defendants could only be allowed, as between party and party, to attend the execution of the commission by an agent.

In this state of things, the Master (*Dowdeswell*) desired that evidence should be laid before him to show the propriety of the journey. Accordingly an affidavit was made by Mr. Weatherall, from which it appeared that when the deponent and his partners were first introduced into the cause, they found that the defendants' counsel had advised that it was unnecessary for them to enter into evidence ; but that, not being satisfied with this advice, the deponent and his partners prepared a case and laid the pleadings before another counsel, who advised that it would be necessary for them not only to examine witnesses, but to cross-examine the witnesses of the plaintiff ; and that it was also necessary that a notice to produce the alleged agreement, as well on the execution of the commission as on the hearing of the cause, should be served and proved ; and further, that proof should be given of the death of a witness to certain bonds proved for the defendants. The affidavit also contained a statement that, from the great lapse of time since the death of Thomas Tyler the son, which took place in 1809, the defendants were unable to give the deponent the name and address of any per-

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sons to be called as witnesses on their behalf, and therefore it became necessary to make many personal inquiries; that it was also necessary to *search for and procure the certificate of one Hopkin Llewellyn, who was buried about fourteen miles from Neath; that the deponent procured this certificate and was examined under the commission to verify it, and also to prove the notice to produce the agreement. The deponent then stated that had he not procured such certificate, the defendants would have been obliged to employ an agent to search for and procure the certificate and make the inquiries: but that such agent would have had to attend the commission as a witness and be paid as a witness, and that he could not, in the judgment of the deponent, have made the proper inquiries without perusing the pleadings and informing himself of the points in the cause; and that no agent for the usual charges would have interested himself sufficiently to benefit the defendants in their defence. The deponent then, after mentioning other steps which would have been necessary if an agent had been employed, and after stating that he had been the means of having the commission executed by two commissioners instead of four, alleged that in his judgment the journey was indispensable, and a saving of expense, and that by the means aforesaid the defendants were enabled to make, and did make, a successful defence in the suit.

Master *Dowdeswell*, having taken time to consider the case, gave a written judgment upon it, as follows:—

On considering Mr. Weatherall's affidavit, I am of opinion that the expenses of his journey to Neath &c. may be allowed. It is admitted that his attendance as a witness was necessary, but it is urged that an agent ought to have been employed who could have acted as the solicitor. I very much doubt however, whether under the circumstances here stated any expense would have been saved by the employment of an agent; and as I do not understand the rule, that the costs of a London attorney attending the execution of a commission in the country shall not be allowed on taxation of costs as between *party and party, to be so imperative as not to be relaxed [*286]

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 1843.—*Howell v. Tyler*.

under circumstances, in this case I think there are circumstances, which sufficiently show that it ought to be relaxed.

In accordance with this decision Master *Dowdeswell* made his report, whereby he stated the result of the taxation of the costs of the defendant Thomas Tyler: allowing therein to that defendant, as between party and party, the sum of 4*l.* 8*s.* as his share of the before-mentioned sum of 13*l.* 4*s.* This report was confirmed.

The cause being set down for hearing for further directions by the remaining defendants, such hearing came on before *Knight Bruce*, V. C. on the 14th November, 1842, when, the plaintiffs not appearing, it was ordered that the bill should stand dismissed as against the remaining defendants, with costs to be taxed by the taxing Master in rotation, and that the plaintiffs should pay those defendants such costs when taxed.

In consequence of this decree the remaining defendants laid before the taxing Master a bill of costs, wherein they claimed to be allowed 8*l.* 16*s.*, the balance of the sum of 13*l.* 4*s.* allowed by Master *Dowdeswell* for travelling expenses, as before mentioned, and in support of such claim they produced before the taxing Master the before mentioned affidavit of Mr. Weatherall and the written judgment of Master *Dowdeswell*; and amongst other reasons which they urged to show that their rights and interests could not have been properly protected by an agent, they represented, as the fact was, that on the execution of their commission their solicitor was served with a notice that a witness who had been subpoenaed on their behalf was under examination on the part of the plaintiffs; upon which their solicitor caused that person to be cross-examined, and the cross-examination was read to this Court; and they submitted that in-
 [238] asmuch as such a "proceeding could not have been anticipated, no agent could have been instructed so as to meet such a state of circumstances.

The taxing Master, after hearing the case, admitted that the defendants' solicitor did quite right to take the journey on behalf of his clients, and expressed his opinion that the expenses of it would be allowed as between solicitor and client; he, however, decided that as between party and party no such

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allowance could be made, and he disallowed the whole of the sum of 8*l.* 16*s.* He also, though taking into account the supposed expense of employing an agent, refused to allow anything for the supposed agent's reading the pleadings and papers in the cause.

The defendants now presented their petition to the Court, by which they submitted that in taxing their costs, as between party and party, the taxing Master ought to have allowed them the sum of 8*l.* 16*s.*, being their proportion of the before-mentioned sum of 13*l.* 4*s.*, the amount of the travelling expenses, and 14*s.* being their proportion of a guinea which had been charged by their commissioner for reading of the pleadings, and thereby enabling himself to discharge his duty as a commissioner. The petitioners prayed for liberty to except to the taxing Master's certificate, and that it might be referred back to him to review his taxation.

Mr. *Simpkinson* and Mr. *Bacon*, for the petition.

Mr. *W. M. James*, *contra*.

THE VICE-CHANCELLOR.—In the absence of any authority on the first point except that of the two Masters, who differ in opinion, and there being no evidence but Mr. Weatherall's affidavit, I must decide as I best can between the parties upon the materials before me.

"It appears to me that it cannot be an universal rule [239] that in a case where a London solicitor has the conduct of a cause, that solicitor should not be allowed to attend a commission to examine witnesses in the country. On the other hand it is clearly not an universal rule that he should be allowed to do so. I agree with Master *Dowdeswell* that it must depend on the circumstances of each case.

Having regard to the uncontradicted statement in Mr. Weatherall's affidavit, I come to the same conclusion in this particular case as Master *Dowdeswell* did. Therefore, in this case, the allowance ought to be made; but there must be a deduction of

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expenses which would not have been allowed if the travelling expenses had been originally allowed.

As to the other point, namely the charge for reading the pleadings, I am in the same condition as to authority and evidence as on the first point, and must therefore judge for myself. I may however say, that the case before Master *Dowdeswell* was conducted by the same solicitors who now conduct it, and that the same solicitors for the respondent who did object to the travelling expenses, and did take the opinion of the Master upon that charge, did not object to this. That shows that it was not considered very remarkable that such a charge should have been included in the bill of costs between party and party. In the absence of authority on the subject, I do not think it unreasonable that this moderate allowance should be given in addition to the two guineas a day received by the commissioner; therefore allow the fourteen shillings.

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*DANIEL V. WARREN.

1843: April 26th.

Testator bequeathed the sum of £2000 in trust for his niece, and if she should die without leaving any issue to attain the age of 21, then in trust for his sister. The niece being unmarried:—*Held*, that she had not an absolute vested interest in the £2000.

Upon the construction of a will, *held* that chattel leaseholds were to be enjoyed in *specie* by the tenant for life of the residuary real and personal estate.

RICHARD HOUSE, by his will, dated the 3rd of February, 1837, and executed so as to pass real estates, after giving certain pecuniary legacies, gave as follows; "I give and bequeath unto John Daniel, Matthew Davies, and the Rev. Edward Ludlow, the sum of £2000 in trust for my niece, Sarah Maria Warren, not to be subject to the debts or control of any husband the said Sarah Maria Warren may have: and if the said Sarah Maria Warren should die without leaving any issue to attain the age of twenty-one years, then in trust for my sister, Sarah Warren, not to be subject to the debts or control of her present, or any fu-

1843.—Daniel v. Warren.

ture husband the said Sarah Warren may have. I give all my other property, of every description and denomination, unto John Daniel, Matthew Davies, and the Rev. Edward Ludlow, in trust for my sister, Sarah Warren, not to be subject to the debts or control of her present, or any future husband the said Sarah Warren may have ; and after the death of my sister, Sarah Warren, then in trust for my niece, Sarah Maria Warren, not to be subject to the debts or control of any husband that Sarah Maria Warren may have ; and, after her death, unto her children in equal shares and proportions ; and in the event of the said Sarah Maria Warren dying without leaving issue to attain the age of twenty-one years, the whole of the property to be sold by public auction ; and £1000 I give and bequeath unto the trustees of my will in equal shares, and the remainder of the property I give and bequeath in equal shares to the six following persons, viz. John House, Roger House and Samuel House, sons of the late James House, and Roger House, of Warminster, son of the late Roger House, and to John Sturgis and Henry Sturgis, sons of the late Thomas Sturgis.

The testator died on the 18th February, 1837, At *the [*291] date of his will and death he was seised of certain freehold estates in fee simple, and certain copyhold estates, held for lives, and was also possessed of considerable personal estate, including certain leaseholds held by him for the respective residues of certain terms of ninety-nine years, determinable on the failure of lives. The leases were not renewable.

The bill was filed by the trustees and executors of the testator's will against Peter Warren, and Sarah his wife, Sarah Maria Warren, and the other legatees named in the will, praying to have the trusts of the will carried into execution. The questions argued at the hearing were, first, what interest Sarah Maria Warren took under the will in the legacy of £2000 ; and secondly, whether the leasehold estates ought to be sold immediately, and the produce invested in the £3 per cents, so as to apportion the benefit of it between all parties, or whether the tenants for life were entitled to the rents *in specic*.

Mr. Lewin, for the plaintiffs.

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Mr. *Simpkinson* and Mr. *William Tayler*, for the defendants, Peter and Sarah Warren.—First, as to the sum of £2000, there is a gift of it over to Sarah Warren, in the event of Sarah Maria Warren dying without leaving issue who attain twenty-one, let that event happen when it may. The words, therefore, which imply an absolute gift of the £2000 to Sarah M. Warren, are cut down by those which follow.

With respect to the leaseholds which are included in the gift of all the testator's other property, they are to be sold after the death of Mrs. Warren and her daughter, and then only. It is clear, therefore, that the tenants for life are to enjoy this property *in specie*. *Alcock v. Slopier*(a) is expressly in point.

[*292] *Mr. *Dixon*, for the defendant, Sarah Maria Warren, upon the first point, contended, that she took an absolute interest in the £2000. Upon the second point he cited *Beathune v. Kennedy*.(b)

Mr. *Berkely*, for the defendants, John House and others.—It is necessary for the trusts of the will that the property should be sold immediately. No case has gone the length of deciding, that, where a particular time has been appointed for the sale, the property shall not be sold before that time if necessary. The testator did not mean that the property should not be converted until the period mentioned, but that it should not be unconverted after that period. In the cases cited the clear rents were directed to be enjoyed *in specie*. In *Mills v. Mills*.(c) which was a stronger case than this, it was held that the property should be converted.

Mr. *Tripp*, for defendants, in the same interest.—In order to prevent conversion there must be a plain indication in the will that the property is not to be converted. In all the recent cases where it has been held not to be converted, there has been an express reference to the property *in specie* under the words "rents," "dividends," &c. In this case the only apparent ground

(a) 2 Myl. & K. 699.

(b) 1 Myl. & Cr. 114.

(c) 7 Sim. 501.

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for directing the sale at the particular time mentioned in the prevention of disputes between the parties interested in the property; but the same reason applies to an immediate sale.

At the close of the argument the *Vice-Chancellor* asked the counsel for the various parties whether their object was to have the estate of the testator administered, or merely to obtain a declaration of construction. In the latter case he should decline making a decree except by consent.

*Mr. Cooper, *amicus curiæ*, upon this point referred to [*293] *Elliotson v. Knowles*.(a)

The counsel for all parties expressed their desire to take a declaration upon the construction of the will by consent.

THE VICE-CHANCELLOR.—I am of opinion as to the sum of £2000 that it is not absolutely vested. The only question would be, whether the words, “and if the said Sarah Maria Warren should die without leaving issue to attain the age of twenty-one years,” meant this—“if she should die in my lifetime without leaving issue.” I am of opinion upon this will that they do not so mean; and that, consequently, according to the true construction of the will, £2000 ought to be invested and the income paid to Sarah Maria Warren for her life, or until further order, with liberty to apply.

With regard to the other question, the rule seems to me accurately laid down in pp. 298 and 299 of the report of *Pickering v. Pickering*, on appeal.(b) There Lord Cottenham says, “Very nice distinctions, &c.” [His Honor here read Lord Cottenham’s judgment to the word “enjoyment,” p. 299.] Now, as I have

(a) In Chancery, May 6th and July 29th, 1842. In this case a mortgagee filed his bill to set aside a voluntary settlement made by the mortgagor of the mortgaged premises. It appeared, in substance, that the legal estate in the mortgaged premises was vested in the mortgagee, but that the mortgage was not forfeited. There being no relief to be granted by way of foreclosure, or otherwise, in equity, the Vice-Chancellor, *Knight Bruce*, declined to make a mere declaration that the settlement was void as against the mortgagee.

(b) 4 Myl. & Cr. 298.

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said, these expressions seem to me to state the rule with accuracy. It is therefore a question of intention upon the construction of the particular will. I confess that my impression is, looking at the whole of this will, and not applying my observations to any other will or to any other case, except for the purpose of discovering those principles upon which all men are agreed, (the only difficulty being in their application,) that there is to be found in this will an expression of intention that the leasehold property, to which alone the argument is confined, should be specifically enjoyed and not converted.

It is an admitted state of things that the testator had both freehold and chattel leasehold property. The relative positions of the two are not in evidence, nor was that point relied upon in argument; but it is agreed on all hands that these two species of property he had, and I must take it to be agreed that these two properties are not required to be resorted to for the purpose of paying debts and legacies; and then I find him using this expression—"I give all my other property of every description and denomination." That must include both freehold and leasehold; showing that he had an impression on his mind that the two species of property were to form one mass for a particular purpose. He then gives them to trustees, not to sell, but "in trust for my sister, Sarah Warren;" in effect, therefore, giving that united property to his sister, Sarah Warren, "not to be subject to the debts or control of her present or any future husband, and after the death of my sister, Sarah Warren, then in trust for my niece, Sarah Maria Warren, not to be subject to the debt or control of any husband that Sarah Maria Warren may have, and after her death unto her children in equal shares and proportions; and in the event of the said Sarah Maria Warren dying without leaving issue to attain the age of twenty-one years, the whole of the property to be sold by public auction;" and so on.

Now, a very fair remark was made in the argument, I think by Mr. *Tripp*, that the object of the testator in mentioning the sale there was, not as indicating an intention that there was to be no sale or conversion in any other event, but for the purpose of preventing disputes between persons whom he might suppose likely to have a dispute as to the division of the

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property. It may be observed, however, that there was a possible division between the children of Sarah Maria Warren, and yet the testator does not express any such intention or wish with regard to them.

Upon the whole, it appears to me, that the fair conclusion to be drawn from the will is, that there was to be no sale or conversion, either of the real or leasehold property thus given together, before the event which is there mentioned; and that, at that time, and not before that time, both species of property were to be sold together. My impression, therefore, is, on this particular will, that there is an expression of intention that the leasehold property should be enjoyed *in specie* by the sister and her daughter.

THE counsel for all parties requesting the Court to declare the construction of the will in that respect, and the Court consenting to do so, declare that the legacy of \$2000 is not absolutely vested in Sarah Maria Warren, but that she is entitled to the income thereof for her life, or until further order, and let it be invested accordingly. Declare that, as between the persons to whom the residue is given, the chattel leasehold estate is not saleable, but ought to be enjoyed by Sarah Warren for her life, and after her death according to the will. Take the ordinary accounts of the testator's estate, unless all parties waive the accounts and the executors submit to an immediate decree.

BRADSHAW V. THOMPSON.

1843: May 5th.

Under a bequest of residuary personal estate to the Westminster Hospital, Charing-cross:—*Held*, that, under the circumstances of the case, the Charing-cross Hospital was entitled, in preference to the Westminster Hospital or the Royal Westminster Ophthalmic Hospital.

WILLIAM WATERS, by his will, dated the 15th December, 1837, after giving certain specific legacies, directed as follows: "And the remainder of my property, consisting of household furniture, plate, books, linen, glass, wines, wearing apparel, greenhouse trees, shrubs, and plants *in gardens, [*296] with all other property of every denomination I may die possessed of, to be sold and equally divided among the fol-

 1843—Bradebaw v. Thompson.

lowing charities, with all other monies that may be in my house, and in my banker's hands : The London Orphan Asylum, Clapton ; St. George's Hospital, Hyde-park-corner ; Middlesex Hospital, Berners-street ; Indigent Blind School, St. George's Fields ; Westminster Hospital, Charing-cross ; London Hospital, White-chapel-road ; Refuge for the Destitute, Hackney-road ; London Ophthalmic Hospital, Moorfields ; Seamen's Hospital Society, Bishopsgate-street."

In the will, these various institutions were stated in columns, the name of each institution being in the first column, and the situation of it in the second.

There was no institution precisely answering to the description of "The Westminster Hospital, Charing-cross." The share of the residue bequeathed by the testator to an hospital under that description was claimed by three different institutions, namely, the Westminster Hospital, situate in the Broad-sanctuary, Westminster ; the Royal Westminster Ophthalmic Hospital, in King William-street, Charing-cross ; and the Charing-cross Hospital, Agar-street, West Strand. Of the two last-mentioned hospitals, the former was situated a few yards nearer to the statue at Charing-cross than the latter.

The Master having reported that the testator, by the description in his will of " Westminster Hospital, Charing-cross," meant the " Charing-cross Hospital," which, according to the Master's statement, afforded relief to all persons in all cases requiring relief, and also immediate assistance in case of accidents, exceptions were taken to this finding by the two unsuccessful claimants, and those exceptions now came on for argument.

Mr. *Koe* and Mr. *Walford*. for the Royal Westminster Ophthalmic Hospital, cited *Wilson v. Squire*.(a)

[*297] *Mr. *Swanston* and Mr. *Bell*, for the Westminster Hospital, observed, that theirs was the only hospital which properly came within the description contained in the will ; and that, if the words " Charing-cross," which were in the second column, were to be regarded, the word " Westminster,"

(a) *Ante*, Vol. 1, p. 654.

 1843.—*Bradshaw v. Thompson.*

which was the principal word in the description, must be given up. If there was any doubt in the description, the Court would administer the fund *cy pres*. *Bennett v. Hayter*,^(a) *Smith v. Campbell*,^(b) *Standen v. Standen*,^(c) *Holmes v. Custance*.^(d)

Mr. Russell, Mr. Wigram, Mr. Lee, Mr. Romilly, Mr. Heathfield, Mr. Simpson, Mr. Kempson, Mr. Faber, Mr. Nevinson, and Mr. William Cooper, for other parties.

THE VICE-CHANCELLOR.—Considering the context of the will and the nature of the subject, it is impossible to treat the second column as immaterial, or otherwise than as entering into the substance of the case. It is impossible, therefore, to hold, under the circumstances of this case, that any hospital can take under the description of the Westminster Hospital, Charing-cross, unless it be at or near Charing-cross; consequently, I cannot treat the hospital in this immediate neighborhood as being, in any sense which can be applied to the subject, at or near Charing-cross.

There are, in a sense in which the term may in this case be properly understood, two hospitals at Charing-cross—hospitals which may, under this will, be correctly described in their local situation by the term, “Charing-cross.” One of these is a general hospital, the other only intended for the reception of persons labouring under a particular complaint. In every instance, whether from necessity or not, where the [*298] testator has meant to describe an institution for complaints of a particular nature, he has so said; where, on the other hand he has intended to describe a general hospital, he has used the term “hospital” generally. By the term, Westminster Hospital, I think he meant a general hospital at Westminster.

There is, it appears, an hospital, which may be described as a Westminster hospital, though not *the* Westminster Hospital, which is at Charing-cross, and in the City of Westminster. But for the claim of the Ophthalmic Hospital I should feel little or

(a) 2 Beav. 81.

(b) 19 Ves. 400.

(c) 2 Ves. 589.

(d) 12 Ves. 279.

1843.—Bradshaw v. Thompson.

no difficulty.. When I consider, however, that that hospital is intended for a particular and not a general purpose—when I consider that the word “ophthalmic” is a most important part of its designation, and when I find, that, in the testator’s will, limited are designated as limited institutions, and general only by general words,—having to elect which of the two institutions is intended, I think that the testator intended that hospital at or near Charing-cross, which is called “Charing-cross,” and is in the city of Westminster.

Before I allow these exceptions I must be satisfied that the Master is wrong. My impression is that he is right, and I cannot upon these materials say that he is wrong.

Exceptions overruled.

[*299.]

*HETHERINGTON V. OAKMAN.

1843: May 6th.

Testator bequeathed the residue of his real and personal estate, upon trust for his daughter, absolutely, upon her attaining twenty-one; provided that in case his said daughter’s decease should happen before the said age of twenty-one, and his, the testator’s wife, should then be living, then in further trust to pay her the whole interest of the residue of his estate and effects; and on her decease, his said daughter being dead before the age of twenty-one, he devised to his wife the house in S. street, her heirs and assigns for ever; then in further trust to pay the produce of his residuary estate unto and amongst his nephews and nieces, the children of his sister Ann, and such of them as should be then living. The daughter died without issue in the lifetime of the wife. The sister had five children living at the death of the daughter, and one only, Isaac, living at the death of the wife:—*Held*, that Isaac was entitled to the whole residue.

“And” construed “or” for the purpose of the construction of a will.

DAVID EWART, by his will, dated the 16th October, 1789, devised as follows:—“I give and bequeath all my real and personal estate unto J. Graham and George Stalker, and the survivor of them, and the executors or administrators of such survivors, in trust to pay an annuity of £100 a year to my wife; also the use of my household goods and furniture; and in further trust to pay over the residue and remainder of my estates

1843.—Hetherington v. Oakman.

and effects to my daughter Margaret, her heirs and assigns for ever, on her attaining the age of twenty-one years, and until such attainment to apply to her maintenance and education not more than £50; provided always, that, in case my said daughter's decease shall happen before the said age of twenty-one, and my said wife shall be then living, then, in further trust, to pay her the whole interest of the residue of my estate and effects; and on her decease, my said daughter being dead before the age of twenty-one, I devise and bequeath to my wife the house in Scotch-street, Whitehaven, her heirs and assigns for ever; *then* in further trust to pay the produce of my residuary estate and effects unto and among my nephews and nieces, the children of my sister Ann, to be divided among them and such of them as shall be then living, share and share alike."

The testator died in December, 1790, leaving his wife, his sister Ann, and his daughter Margaret, surviving him. The daughter married, and died under the age of twenty-one, without issue, in the lifetime of the wife. The sister married David Hetherington, and had several children, five of whom were living at the death of the daughter, and one only, Isaac, was living at the death of the wife. Of *the five chil- [*300] dren of Mrs. Hetherington who were living at the death of the daughter, two had each a child, who was living at the death of the wife, namely Mary Ann, the wife of Charles Oakman, and Henry, the son and personal representative of John Hetherington.

Upon a bill filed by Isaac Hetherington for the administration of the testator's estate, a question arose as to the construction of the residuary clause in the testator's will.

Mr. *Simpkinson* (with whom was Mr. *Austen*,) for the plaintiff, submitted that he was entitled to the whole of the residue, observing that the word "then," in the sentence "then in further trust &c.," could only refer to the period of division, which was not to take place till after the wife's death; *Sturges v. Pearson* ;(a) and the plaintiff was the only child of the sister then living. "And such of them as shall be then living," must be construed "*or* such of them" &c.

(a) 4 Madd. 411.

1843—Hetherington v. Oakman.

Mr. *Swanston* and Mr. *Rasch*, for the defendants *Oakman* and wife.—The words, “on her decease,” refer to the death of the daughter. The word “her” cannot refer to the wife, for otherwise the testator will have given his wife a house upon her own decease. Then, if the word “her” refers to the daughter, the words “then in further trust &c.” must refer to the period of the daughter’s death. Upon the whole, the words are sufficient to give all the nephews and nieces a vested interest. The Court, if possible, will exclude none. *Belk v. Slack*,^(a) *Willis v. Plaskett*,^(b) *Tipping v. Power*.^(c)

Mr. *Russell* and Mr. *Dixon*, for the defendant Henry [301] **Hetherington*.—The period of distribution is the death of the daughter under 21, living the wife. That is the period referred to throughout the whole will. [The *Vice-Chancellor* referred to *Massey v. Hudson*.^(d)]

Mr. *Malins*, who was with Mr. *Purvis*, for other defendants, mentioned *Davis v. Norton*.^(e)

THE VICE-CHANCELLOR.—I do not find myself able to doubt in this case. It is impossible, upon any reasonable construction, to read the word “and” in the clause, “and such of them,” &c., otherwise than as “or.”^[1] The question is, what is the meaning of the word “then?” It appears to me to refer to the period at which the gift was to take effect in possession. Was that period the death of the daughter or the death of the wife? I am of opinion that nothing was to be done in the way of distribution till after the death of the wife, and that, as there was one nephew only living at the death of the wife, that nephew takes the whole residuary property.

(a) 1 Keen, 238.

(b) 4 Beav. 208.

(c) 1 Hare, 405.

(d) 2 Mor. 133.

(e) 2 P. W. 390.

[1] That “and” may be read “or,” and so *vice versa*, when the change is rendered necessary by the context, see *Hammond v. Denton*, 1 Har. & M’Hen. 200; *O’Brien v. Heeny*, 2 Edw. 242; *Jackson v. Blanshaw*, 6 John. 54; *Beall v. Deale*, 7 Gill & John. 216; *Mills v. Dyer*, 5 Sim. 435; *Markhouse v. Markhouse*, 3 Sim. 126; *Sayward v. Sayward*, 7 Greenlf. 210; *Carpenter v. Heard*, 14 Pick. 449; *Thackeray v. Hampson*, 2 Sim. & Stu. 214; *Jarman on Wills*, vol. i, p. 445, and note 1: *Jackson v. Rees*, 1 Wend. R. 338.

1843.—Symons v. James.

SYMONS V. JAMES.

1843: May 8th and 11th.

Testator commenced his will with a direction that all his debts and all his funeral and testamentary expenses should be paid by his executors as soon as conveniently might be after his decease:—*Held*, upon the construction of the whole will, that this clause had not the effect of charging real estate of the testator, whether devised to the executors, or otherwise, with the payment of his debts.

A devise of freehold, copyhold, and leasehold property, apparently general and residuary, held to be specific.

THE will of George Symons of Axbridge in the county of Somerset, dated the 12th August, 1830, was in the following terms:—"I direct that all my debts and all my funeral and testamentary expenses shall be paid by my executors as soon as conveniently may be after my decease. I give and bequeath unto my dear wife Elizabeth Symons the bedstead and furniture, mattress, bed, and bed clothes thereon, and the [302] chest of drawers in the bedroom wherein I sleep, to be delivered to her within one calendar month next after my decease." And the testator willed and directed that his trustees thereafter named should permit and suffer his said wife to use and occupy either the front or the back parlor in his dwelling-house at Axbridge aforesaid, as she might choose to prefer; and also to use and occupy his said bedroom and such of the furniture therein as was not therein before given to her; and also to use the kitchen and culinary utensils therein or belonging thereto; and also to use the pantry, dairy, and cellar in and belonging to his said dwelling-house, and part of the garden &c. to be allotted to her by his said trustees: all which use and occupation should be for the term of twelve calendar months from the time of his decease. And he gave and bequeathed unto his said wife the sum of £50, to be paid to her within twelve calendar months from the time of his decease. And he gave and bequeathed unto his said wife and his daughter Harriet Campbell the sum of £25 each for mourning, and £20 each for mourning for his four grand-children after named. And he gave and bequeathed unto each of his said trustees the sum of £25, as a mark of his esteem. And he thereby confirmed the settlement

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of an annuity of £100, made on his said wife before their marriage, during her life, if she should so long continue his widow; and in addition thereto he gave and bequeathed to her a further annuity or yearly sum of £50 during her life, if she should so long continue his widow. And he directed that each of the said annuities should be paid half-yearly in even proportions, and that the first-half-yearly payment thereof should be made at the end of six calendar months next after his decease. And he thereby directed that the same several annuities should be paid out of his residuary personal estate, or that his said trustees or the survivors or survivor of them, his heirs, executors, or [*303] administrators, should or might invest "a sufficient sum of money in or upon some good and sufficient mortgage or security, the interest or annual produce whereof would be sufficient to pay the same annuities, and therewith to pay the same accordingly. Then followed bequests of household linen and plate to his wife and daughter and his grandson George Criddle Symons. And he gave and bequeathed unto his said grandson George Criddle Symons all his law books, and unto his grandson Edward Symons all his other books. And he gave and bequeathed unto such of his male and female servants as might be living with him at the time of his decease the sum of £5 each, to be paid to them respectively within one calendar month next after his decease. And he gave, devised, and bequeathed unto William James, Richard Parsley, and Henry Star therein severally described, all his manors, messuages, lands, tenements, and hereditaments, as well freehold and copyhold as leasehold, with their and every of their rights, members, and appurtenances, subject to such use and occupation as he had thereinbefore directed to be permitted by his said trustees to his said wife, and also all the rest and residue of his personal chattels and effects not thereinbefore given and disposed of, to hold the same unto and to the use of the said William James, Richard Parsley, and Henry Star, their heirs, executors, and administrators, and assigns upon the following trusts, (that is to say,) as to, for, and concerning his said dwelling-house (subject as aforesaid,) together with the household furniture and moveable chattels, except such part thereof as was thereinbefore given to

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his said wife, and as to such other part thereof whereof she was to have the use (subject to such use as aforesaid,) and the appurtenances, upon trust that they his said trustees and the survivors and survivor of them, his heirs, executors, and administrators, should occupy, keep, and manage the same in such manner as they or he should think proper, so as that his grandchildren Maria Symons, George Criddle Symmons, Eliza

*Symons and Edward Symons might continue to reside [*304] in his said dwelling-house and premises until his said grandson Edward Symons should have attained his age of twenty-four years, if they his said grandchildren respectively should think fit so to reside therein. And when and as soon as his said grandson Edward Symons should have attained his said age of twenty-four years, then upon trust that they his said trustees or the survivors &c. should convey, assign, and transfer all and singular the same premises, chattels, and effects unto and to the use of his said grandsons George Criddle Symons and Edward Symons, to be divided equally between them as tenants in common and not as joint tenants, their heirs, executors or administrators; with benefit of survivorship in the event of either dying without having attained twenty-four.

And as to, for, and concerning a messuage or dwelling-house, garden, and other hereditaments which the testator purchased of Thomas Day Mason, and his freehold piece or parcel of land situate at Mark in the said county of Somerset, and his leasehold messuage or tenement and premises held by him under several leases for lives granted by the late bishop of Bath and Wells, situate at Westwick in the said county &c., upon trust that they his said trustees and the survivors &c. should receive the rents, issues, and profits thereof, and pay the same unto his said daughter Harriet Campbell for her own sole and separate use and benefit, in like manner as thereafter mentioned of and concerning the sum of £2000 to be invested in trust for her benefit, for and during the term of her natural life; and after her decease, then upon trust for such one or more of the testator's said grandchildren, Maria Symons, George Criddle Symons, Eliza Symons and Edward Symons as the said Harriet Campbell should in manner therein mentioned appoint; and in default of such appointment,

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upon trust for his said grandsons George Criddle Symons
[*305] and Edward Symons, or such of them as *should live to attain the said age of twenty-four years, as tenants in common, their heirs, executors, administrators and assigns.

And as to, for, and concerning his seven leasehold cottages or tenements formerly called the Malthouse, and his freehold messuage or tenement, late Dovey's situate in the parish of Axbridge, and also several other specified freehold, copyhold, and leasehold messuages in Axbridge and Winscombe, with their and every of their rights, members, and appurtenances, upon trust that they his said trustees and the survivors &c. should permit and suffer his son George Symons from time to time to let and set the same, and receive the rents and profits thereof for and during the term of his natural life. And he directed his said trustees or trustee for the time being to join with his said son George Symons in granting such lease or leases as he might think fit for any term or terms for years determinable on the life of his said son George Symons. And from and after the decease of the said George Symons, then upon trust that they his said trustees or the survivors should sell all the last-mentioned estates and convey the same as in the will mentioned; and as to the clear monies which should arise and be received from all or any such sales after payment of all the expenses of such sales, upon trust to add the same to his the testator's personal estate, to the intent that the same might become parcel thereof and be disposed of accordingly.

The testator then directed that his trustees should, as soon as conveniently might be after his decease, by and out of his said personal estate, satisfy and pay all the principal monies which at the time of his decease should be due and owing upon or by virtue of any mortgage or mortgages of the said freehold, copyhold, and leasehold hereditaments and premises so limited in trust for his said son George Symons for his life, or any part or parts thereof, together with all such interest as might be
[*306] due and grow due for the same, *to the intent that his said son George Symons might have and enjoy the rents and profits thereof without any deduction for interest: and also, by and out of his said personal estate, satisfy and pay all the principal monies which at the time of his decease should be due

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and owing upon or by virtue of any mortgage or mortgages of any other of his messuages, lands, tenements, and hereditaments (except on his manors, messuages, lands, tenements, and hereditaments next thereafter mentioned,) together with all such interest as might be due or grow due for the same; to the intent that the person or persons who might be entitled to hold the same under the trusts of that his will, might enjoy the rents and profits thereof without any deduction for interest.

And as to, for, and concerning all that his manor or lordship of East Brent, and all those his messuage, lands, tenements, and hereditaments purchased therewith, and situate, lying, and being in the several parishes of East Brent, South Brent, or elsewhere, in the county of Somerset aforesaid, upon trust, that they his said trustees, or the survivors or survivor of them, or his heirs, should let and set the same as soon as conveniently might be after his decease, for any term or terms for years, which should expire not later than the 1st March, 1834, at the best and most improved yearly rent or rents, &c., and by and out of the rents and profits thereof should pay and keep down the interest which should from time to time become due and payable for and in respect of the principal monies which should be due and owing on the mortgage, then subsisting, of the same manors, messuages, and hereditaments. And as to all residue of the same rents and profits which should from time to time remain after keeping down the interest on the said mortgage, upon trust that they his said trustees should invest the same for the purpose of accumulation, and out of the accumulations pay two sums of £2000 each to or for the benefit of his grand-daughters *Maria [*307] and Eliza Symons at their ages of twenty-four years, with benefit of survivorship between them, in case either died under that age, and in the event of neither attaining twenty-four, the said sums to be added to the testator's personal estate; and upon trust, after the 1st March, 1834, to sell the manor and hereditaments, and apply the proceeds of the sale, first, in payment of any mortgage subsisting on the estate, then in aid of the before-mentioned bequests to his grand-daughters, and out of the surplus to apply £2000 for the benefit of his daughter, Mrs. Campbell, for her life, for her separate use, and at her decease, for the

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benefit of the four grandchildren before named, and the residue to other persons. The will then contained clauses giving the trustees discretionary power to apply any portion of the capital of the legacies in the advancement of the legatees, or any portion of the capital or interest in their maintenance, previously to their attaining the age of twenty-four. Then followed a direction to the trustees to pay four shillings per week to the testator's servant William Offer. Then followed this clause: "And as to, for, and concerning all my messuages, lands, tenements, and hereditaments, as well freehold and copyhold as leasehold, situate, lying, and being in the several parishes of Axbridge, Cheddar, Compton Bishop, Bridgewater, or elsewhere, in the County of Somerset aforesaid, subject to all such mortgages or other incumbrances as may affect the same at the time of my decease, and all other my real and personal estates and effects of what nature or kind soever, not hereinbefore given or disposed of, upon trust for my said grandsons George Criddle Symons and Edward Symons, as tenants in common, and not as joint-tenants, their heirs, executors, administrators, and assigns, for all my estates, terms, and interests therein respectively." And the testator nominated and appointed his said grandsons, George Criddle Symons and Edward Symons to be joint executors of his will.

By a codicil, the testator revoked the devise and [*308] "bequests to Star, and his appointment as a trustee, and devised the trust estates to his son George Symons, whom he appointed a trustee, jointly with the other trustees.

The testator died before the passing of the statute 3 & 4 Will. 4, c. 104, namely, in or about the year 1832, and he was not at that time a trader within the meaning of the bankrupt laws. At his death the estate devised to Mrs. Campbell for life was mortgaged to the extent of £600. That devised to George Symons for life was mortgaged for £450. There was also a mortgage on the East Brent estate. The testator likewise owed specialty debts, not secured by mortgage, to the extent of about £1099, and simple contract debts to the extent of about £1274. He had little or no personal property, except that by the sale of his chattel leaseholds after his death a sum of about £3130 was realized.

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The original bill was filed by four of the above-named grandchildren of the testator, who were infants, against the trustees, the testator's widow, and the tenants for life and other persons beneficially interested in the estates; and upon George Criddle Symons coming of age and proving the will he was made a defendant by supplemental bill.(a) The object of the bill was to ascertain to what extent and in what order the testator's debts should be borne by his real estates, and whether the assets could in any manner be marshalled in favour of the widow and other pecuniary legatees.

The cause now came on for hearing for further directions.

Mr. Russell and Mr. Prendergast, for the plaintiffs.

Mr. Swanston and Mr. E. P. Smith, for Mrs. Campbell.

Mr. Anderdon and Mr. Cooke, for the pecuniary legatees.

*Mr. Simpkinton, Mr. Kenyon Parker, Mr. Wigram, [*309] Mr. Hallet, Mr. Collins, Mr. J. Bailey, Mr. Malins, and Mr. Dickenson, appeared for other parties.

The principal questions discussed were:—1. Whether by virtue of the introductory direction in the will the real estates devised to the executors were charged with the payment of the testator's debts: *Henvell v. Whitaker*,(b) *Finch v. Hattersley*,(c) *Powell v. Robins*,(d) *Attorney-General v. Moor*,(e) *Dover v. Gregory*,(f) *Wasse v. Heslington*.(g) 2. Whether the gifts of the real estate and chattel leaseholds contained in the last clause in the will were general or specific; and whether in the event of those gifts being held to be general, the pecuniary legatees would be entitled to have the assets marshalled against the general devisees. *Long v. Short*,(h) *Cole v. Turner*,(i) *Mirehouse v. Scaife* (k) 3. Whether the words "subject to all such mortga-

(a) See White on Revivor and Supplement, p. 20.

(b) 3 Russ. 343.

(c) Id. 345, n.

(d) 7 Ves. 209.

(e) West. Ca. temp. Hardw. 102.

(f) 10 Sim. 393.

(g) 3 M. & K. 495.

(h) 1 P. W. 403.

(i) 4 Russ. 376.

(k) 2 Myl. & C. 695.

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ges &c.” in the last devise, affected the right of the devisees to have the mortgages on the lands there devised discharged out of the general personal estate of the testator: *Serle v. St. Eloy*,^(a) and if it did not, in what manner the deficiency of the personal estate to pay these and other mortgages was to be made up: *Halliwell v. Tanner*.^(b) Whether also to the extent to which the mortgages might be satisfied out of the personalty, the pecuniary legatees were entitled to stand in the place of the mortgagees: *Wythe v. Henniker*.^(c)

May 11th.—THE VICE-CHANCELLOR.—The first question which I reserved for consideration was that as to the effect of the introductory words of the will in this case, directing [*310] the “payment of the testator’s debts and funeral and testamentary expenses by his executors. This passage cannot, and perhaps there is not any clause in the instrument which can, be properly considered without reading the whole will. And after more than one attentive perusal of it, having regard to all the gifts and passages that it contains respecting the two grandsons who are the executors, as well as others, I am of opinion that the introductory clause, as used by this testator, was not intended by him to charge the real estate, or make the two grandsons, or the gifts to them, liable, otherwise than as they would have been if it had been omitted. I view it and must treat it as a matter of mere form, inserted without any view to the regulation of the enjoyment or distribution of his property.

It is unnecessary for me to say whether I do or do not entirely agree with the decisions in *Finch v. Hattersley*, *Henvell v. Whitaker*, and *Dover v. Gregory*. My judgment in this case, upon the particular will before me, may well stand with them. Supposing that I had decided *Henvell v. Whitaker*, and continued to think it rightly decided, I should say of the present case with reference to that, as Sir John Leach said of *Wasse v. Heslington* with reference to *Henville v. Whitaker*, that, in that case, it appeared to me manifest from the whole will that the testator intended to subject all his property given by his will to

(a) 2 P. W. 386.

(b) 1 R. & M. 633.

(c) 2 M. & K. 635.

1843.—*Symons v. James*.

the executors with the payment of his debts and funeral expenses. It appears to me in this case to be equally manifest that he had not that intention.

The next question is as to the ultimate gift or gifts to the two grandsons contained in the will in these words:—"And as to, for and concerning all my messuages &c." [His Honor here read the last devise in the will, as before stated.(a)]

This gift, or set of gifts, is specific of course, though also "in a sense residuary, so far as real estate is concerned, and is residuary, but contended to be also specific, as far as personal estate is concerned. It may be observed, however, that it has not been alleged, and I do not understand, that the testator had any real or leasehold property not situate in the county of Somerset. [311]

As to the real estate, under these circumstances, having consulted the authorities to which I was referred and some others, I am of opinion, having regard to the whole will, that the gift must be treated as, for all purposes, specific—carrying with it the same privileges and benefits as the other specific gifts of real estate which the will contains. The question whether the chattel leaseholds in Somersetshire, including in this gift, are to be considered as given specifically, or merely as part of the residue, may be of some difficulty.

The construction on which the solution of this question depends must of course be gathered from a view of the whole will; and, taking it altogether, I am of opinion that these chattel leaseholds were meant to be given specifically, and ought, for every purpose and in every view, to be so treated.

I have before said that all the costs, and costs, charges, and expenses of the suit to the present time, so far as they have been, or shall now be directed to be taxed, ought to be apportioned among the different portions of the testator's property to which they have related, or by which they have been occasioned respectively, unless a different course has in any former stage of the cause been directed without reservation. If that has been done, I of course must not disturb it.

(a) See *ante*, p. 307.

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DECLARE that the East Brent mortgage is to be borne by the East Brent estate exclusively, and that, subject to that exception, the personal estate, not specifically bequeathed, ought to be applied in payment of the mortgages and other specialty debts of the testator, so far as it will extend; and it appearing that such personal [*312] estate is insufficient for that purpose, *let the same be applied rateably in discharge of the several mortgages and other specialty debts. Declare that to the extent to which the mortgage debts shall not be satisfied out of such personal estate, each devised estate must defray the residue of the mortgage debts charged on it. Declare that the deficiency of the specialty debts, not being mortgage debts, and the deficiency of the simple contract debts ought to be borne by the several devised estates, and the specifically bequeathed personal estate rateably. Let the Master apportion the amount to be so contributed between the several properties so liable to contribute.

 PETO V. GARDNER.

1843: April 21st.

Residuary personal estate was given by a will to such of the children of P. as should be living at his death, in equal shares. At the death of the testator there were five children of P., and no more, four of whom being adults entered into an agreement to the effect that, as amongst themselves, their respective shares, and any share that might accrue to them by the death of their infant sister, should be considered vested in them immediately, notwithstanding P. was living. After this, two of the children settled their respective interests in favor of their issue, who were minors. Upon the remaining child coming of age she was desirous to join in the arrangement, which the Master found would be beneficial to all parties. The Court, however, declined, on the ground of want of jurisdiction, to make a decree for carrying the arrangement into execution.

HENRY PETO, by his will, dated the 13th September, 1830, and executed so as to pass freehold estates, after giving various pecuniary and specific legacies, gave and devised unto Thomas Grisell, Samuel Moreton Peto, and Edward Gardner, their heirs, executors, administrators, and assigns, all his freehold, copyhold, and leasehold messuages, lands, tenements, hereditaments, and premises (except certain leaseholds particularly mentioned,) upon trust, at the discretion of his trustees, to make sale thereof, and after payment thereof of his debts, legacies, funeral and testamentary expenses, to invest the residue of the proceeds of such sale in the Government funds, and to stand possessed there-

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of in trust to pay certain annuities given by the will; and as to all the rest, residue, and remainder of his estate and effects whatsoever, including the produce of the sale of his freehold, copyhold, and leasehold estates not by him thereinbefore disposed of, the testator directed that it should be at his decease divided, or considered as divided into five equal parts; and he thereby gave and bequeathed one-fifth part thereof unto, between, and amongst *all and every the then present children of his [*313] brother, William Peto, the elder, who should be living at the time of the decease of the said William Peto, but not to be transferable and paid to such issue until after his decease; and the testator appointed the before-named Thomas Grisell, Samuel Moreton Peto, and Edward Gardner, the executors of his will.

At the time of the death of the testator, there were five children, and no more, of William Peto, the elder, namely the before-named Samuel Moreton Peto, William Peto the younger, Sophia, James, and Ann.

By an indenture, dated the 31st March, 1838, and made between the four first named of the five children, Ann being then an infant, reciting the will of the testator, and that, in order to prevent loss to the issue and estate of such of the said four adult children of William Peto, the elder, parties thereto, as might happen to die in his lifetime, and to place them all, whether some of them should so die, or all of them happen to survive him, upon the same footing in respect to all the interests to be eventually taken by them under the will, and including such further share as might possibly fall in and accrue upon the decease of their infant sister Ann in their father's lifetime, the said four children had agreed as between themselves, and as far as regarded their own respective rights and interests under the will, to consider their interests thereunder, as at the date of the present indenture, not contingent but actually vested, and that the circumstance or fact of the death of any of them in the lifetime of their father should not prevent their respective shares in the said one-fifth part of the testator's residuary estate from vesting in the representatives of the deceased, as part of their, his, or her estate: it was witnessed that for establishing the said agreement, and in consideration of the mutual expectant benefit of

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the chance of survivorship as between the parties thereto, in case any one or more of them should happen to die in [*314] the "lifetime of the said William Peto, the elder, the share or shares of the parties or party so dying should not survive and accrue to and for the benefit of such of the said four children parties thereto as might outlive their father, but should devolve to the representatives and assigns of the deceased children or child as part of their, his, or her estate, in the same manner as if the shares had vested in interest in all four of the parties thereto at the time of the testator's death, and had not been made contingent by the death of any of the said children, parties thereto, in the lifetime of their said father; and that the survivors or survivor of such children, parties thereto, who should happen to outlive their said father, should be considered as trustees or a trustee for the representatives or assigns of the deceased children or child, parties or a party thereto, of and so far as regarded the shares or share of such deceased children or child, parties or a party thereto, of and so far as regarded the shares or share of such deceased children or child, and including such shares or share as might accrue upon the decease of any of the said five children, whether infants or adult, as they, he, or she should have been entitled to had they, he, or she survived their said father.

By an indenture of settlement, dated the 2nd April, 1838, and made between Sophia Peto of the one part, and the before-named Thomas Grisell and Samuel Moreton Peto of the other part, reciting the will of the testator, and the last stated indenture, all the presumptive and expectant share of Sophia Peto in the one-fifth part of the testator's residuary estate was assigned to the parties thereto of the second part, their executors, administrators, and assigns, as to one moiety in trust for the said Sophia Peto and her assigns, for her own sole and separate use and benefit, free from the debts of any after-taken husband, and subject to her appointment, notwithstanding any future coverture, and in default of such appointment upon the same trusts as the other moiety; and as to the other moiety, upon certain trusts [*315] for the benefit of herself and "her issue, in the event of her marriage, in strict settlement.

1843.—Peto v. Gardner.

In October, 1839, Sophia Peto married William French, and there were issue of the marriage two children.

By an indenture of settlement, dated the 3rd April, 1841, and made between Samuel Moreton Peto of the first part, Mary Peto his wife of the second part, and E. B. Gardner, and James Taylor of the third part, reciting the will, the indenture of the 31st March, 1838, and the desire of S. M. Peto, of making a more competent provision for his wife, it was witnessed that, for effectuating such desire, all the expectant and presumptive share, as well original as accruing, of the said S. M. Peto, in the one-fifth part of the testator's residuary property was assigned to the parties of the third part, upon trust, to invest &c., and pay the dividends to Mary Peto, for her life, for her separate use, and after her decease to assign and transfer the capital to such persons as she should appoint, and, in default of appointment, to her next of kin.

Mary Peto died in May 1842, without having executed her power of appointment under the last mentioned deed, leaving four children by her husband S. M. Peto.

In January, 1842, Ann Peto, who had then lately attained the age of twenty-one years, joined with her brothers William and James, in the execution of a deed to the like purport and effect, as to their respective interests under the will, as that of the 31st March 1838; reserving however to the last-mentioned deed its full operation.

The present bill was filed by the infant children of Samuel Moreton Peto and Sophia French, against the trustees under the testator's will, the trustees of the settlements, and the children of William Peto the elder, for the purpose, if possible, of obtaining a decree for carrying the deed of the 31st March, 1838, into execution.

It having been referred to the Master to inquire whether the arrangement between the parties would be *beneficial to them, he by his report found that the arrangement between the several parties was incomplete, by reason of Ann Peto not having attained her age of 21 years when the agreement of the 31st March, 1838, was made and executed, in consequence whereof she could not be a party to such agreement. [*316]

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That the defendants Samuel Moreton Peto and Sophia French were rendered incompetent, by reason of their respective settlements, to join in an agreement with Ann Peto so as to complete the arrangement with the several parties. And he was therefore of opinion, that it would be fit and proper and for the benefit of the plaintiffs and all parties to this suit not competent to consent, who were presumptively or otherwise entitled under the indentures of settlement, of the 2nd April, 1838, and the 3rd April, 1841, that the defendants, Thomas Grisell, Samuel Moreton Peto, William French, Edward Bensley Gardner, and James Taylor, the trustees of the settlements, should, on behalf of themselves, and all parties interested under the same, accede and become parties to an agreement or arrangement of the nature of that contained in the indenture of the 31st March, 1838. And he was of opinion, that having regard to the intentions of the parties to prevent loss to their issue, as expressed in the deed of agreement of the 31st March, 1838, such agreement or arrangement could and might be carried into effect under the sanction and direction of this Court, by means of a deed of agreement or arrangement to be settled and approved of by him, wherein the defendants Thomas Grisell, Samuel Moreton Peto, William French, Edward Bensley Gardner, and James Taylor, in their character of and as trustees of the indentures of settlement, should severally agree with the defendants William Peto the younger, James Peto and Ann Peto, for converting the respective shares of the children of William Peto the elder in the residuary estate into vested interests instead of contingent interests.

[*317] *This report was absolutely confirmed.

The cause now came on for hearing for further directions.

Mr. *Russell*, and Mr. *Piggott*, for the plaintiffs, relied on the Master's finding; and observed, that, in effectuating arrangements of this sort relating to real property, the Court had gone a considerable length, and that the same principle would apply to personal property. *Taylor v. Philips*,^(a) *Chetwynd v. Fleetwood*.^(b)

(a) 2 Ves. sen. 23; Bell's Suppl. 258.

(b) 1 Bro. P. C. 300 (ed. Toml.)

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Mr. *Wigram*, and Mr. *Dawson*, for the defendants.

THE VICE-CHANCELLOR.—If I could see any question in dispute here, it is possible, consistently with practice and principle, that some arrangement might be made upon certain terms. But with regard to the validity of these two settlements, not only no question has been raised, not only the pleadings have proceeded upon the validity of these two settlements, but there seems considerable reason to contend that, having regard to the position occupied under the will, the foundation of the whole gift, by the persons who were trustees of these two settlements and who executed them, there would be a positive difficulty in impeaching them upon the ordinary ground relating to voluntary assignments. There is, however, no question as to their validity upon the materials before me, and I must therefore assume their validity.

Then the question is this. Certain property is settled by the will. Part of the property so settled is an interest contingent on the death of Ann Peto. It is proposed to withdraw this part from the operation of the settlement—"deliberately" [*318] to unsettle it—to take it, on others giving up some other contingent claim. There is nothing in dispute. It is, in fact, a withdrawal by sale or exchange of part of the settled property, in consideration of the substitution of something else. It appears to me not competent to the Court to carry such an arrangement into execution; but under the circumstances of the case, I have no objection to say that the arrangement is, in the opinion of the Court, beneficial to the parties.

DECLARE that, in the opinion of this Court, it would be beneficial to effectuate the agreement, and let the parties be at liberty to apply for such act of Parliament for that purpose as they may be advised.

 1843.—*Matthews v. Matthews.*

MATTHEWS V. MATTHEWS.

Quære, whether a decree by default can be had on a Seal-day?

THIS cause, with others, was set down for hearing on a Seal-day. The cause being called on, for hearing, the defendant did not appear.

Mr. *Freeling*, for the plaintiff, asked for a decree.

THE VICE-CHANCELLOR expressed a doubt whether a decree by default could be had on a Seal-day, and directed that the cause should stand over.

[*319]

*HOLLAND V. CLARK.

1843: March 4.

S. C., by her will, bequeathed a legacy of £150 to S. H., when she should attain twenty-one. The testatrix died in 1811, the legatee did not attain twenty-one till several years afterwards, and she then married. In 1825, (fourteen years after the death of the testatrix,) her executors signed, and gave to the husband of the legatee a memorandum in the following words:—"We separately and jointly acknowledge to owe to G. H. the sum of £150, being a legacy left to his wife by the late S. C., and £50 interest thereon:"—*Held*, under the circumstances of the case, that this memorandum amounted to an admission of assets by both the executors.

THE Master having made his report under the decree on the hearing [see this case fully reported, 1 You. & Col. C. C. page 157,] and thereby stated the amount due to the plaintiff in respect of the legacy and interest, the cause now came on for further directions. The principal question to be argued being, whether the memorandum of the 25th December, 1825, [see 1 Y. & C. C. 152,] amounted to an admission of assets by each of the executors.

Mr. *Simpkinson* and Mr. *Toller*, for the plaintiff. Indepen-

 1843.—*Holland v. Clark.*

dently of any authority upon the subject the terms of the memorandum necessarily imply an admission of assets. It is not a mere admission that the estate is indebted to the legatee, but it is an admission that the executors jointly and severally owed that sum. They could not admit their several liability unless they each had assets, and the memorandum is in the handwriting of John Clark. A promise by executors to pay a legacy amounts to an admission of assets. *Bothe v. Crampton*,^(a) *Curtis v. Blow*.^(b) In *The Corporation of Clergymen's Sons v. Swainson*,^(c) Lord *Hardwicke* held the repeated payment of interest on a legacy to amount to an admission of assets.

In *Childs v. Monins*,^(d) two persons gave a promissory note by which they, as executors, jointly and severally promised to pay on demand with interest, and it was held that they were personally liable. In *Bradly v. Heath*,^(e) the executors signed a memorandum by which, in consideration of a creditor's consenting to wait for his debt, they, as executors, engaged to pay interest until the debt was settled, and it was held that they were jointly liable to pay the "debt and interest. [*320] There is no case precisely in point with the present; but on every principle, the memorandum, which is dated more than fourteen years after the death of the testatrix, amounts to an admission of assets by each of the executors.

Mr. *Shebbeare*, for the defendant James Clark, who had admitted assets.

Mr. *Spence* for the defendant, John Clark.—In none of the cases cited was the act of the executors treated as an admission of assets, but it was considered that the debt had, by the conduct of the parties, become the personal debt of the executors. In *Childs v. Monins*, Chief Justice *Dallas* observes, "When therefore by the engagement to pay interest, they have induced the plaintiff to suspend his clear and admitted demand, by so doing they make the promise personal and individual."

(a) Cro. Jac. 612.

(b) 2 Barn. & Adol. 426.

(c) 1 Vez. sen. 75.

(d) 2 Brod. & Bingh. 460.

(e) Sim. 543.

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There was no consideration for any engagement on the part of the executor personally to pay the debt, and an agreement to pay the debt of another without any consideration for the agreement is *nudum pactum*, and cannot be enforced at law. *Wain v. Warlters*,^(a) *Egerton v. Mathews*.^(b) If the party would not be personally liable on this document at law, why should he be liable in equity?

The document does not contain any promise to pay, but is merely an acknowledgment that they, as executors, owe the amount. It is a mere repetition of their previous liability. There is no evidence that the legatee was induced to forbear from suing by the signing of the memorandum. It cannot be denied that the document amounts to an admission of assets sufficient to answer the demand, but it does not amount to an admission that each of the executors had received sufficient assets for the purpose. It is not an admission that John Clarke had individually received sufficient assets.

[*321] *THE VICE-CHANCELLOR.—What shall be an implied admission of assets must very much depend on the particular circumstances in each case, the use of authorities being to afford a principle, by the application of which a new case may be decided, though the facts may be specifically different.[1]

(a) 5 East, 10.

(b) 6 East, 307.

[1] In the case of *Postlethwaite v. Mounsley*, 6 Hare, 33, it was held that payment by the executor of the interest of a legacy to the tenant for life under a will, was not conclusive as an admission of assets by the executor; but such payment may be explained as having been made by mistake, or for other reasons or causes; and in that case, the usual account of assets may be directed in a suit of parties interested in the estate. The Vice-Chancellor said, "that there might, no doubt, be a case in which an executor recovering the state of the assets, and assenting to a legacy, would be bound to pay it; but it did not appear to him that that was such a case. It would be difficult to hold, that the payment of one legacy would, of itself, bind the executor to pay all the legacies given by the will. Suppose a case in which small legacies were given to servants, and the executor chose on his own responsibility to pay those legacies at once, without reference to the state of the assets, it would be hard to say that he had thereby conclusively bound himself to pay all the legacies given by the will. The Court allowed an executor who, from an erroneous conclusion of law or fact, had paid parties having claims upon the assets of his testator, out of the order in which they were properly payable, to stand in the place of the parties whom he had

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Now, in the first place, supposing my opinion to be right, that this document did not give a right of action, it would have been

thus preferred; but did not give to the erroneous payment the effect of rendering the executor liable to pay all claims of equal degree."

On the question of the effect of payment and of admission of assets, see *Cook v. Martyn*, 2 Atk. 2; *Corporation of Sons of the Clergy v. Sainson*, 1 Ves. 75; *Bingham v. Bingham*, 1 Ves. 126; *Horsley v. Choloner*, 2 Ves. 83; *Barnard v. Pennfrett*, 5 Myl. & Cr. 63; *Whittle v. Henry*, 2 Beav. 396; *Foster v. Foster*, 5 Bro. C. C. 616; *Philanthropic Society v. Hobson*, 2 Myl. & K. 359; *Nicholls v. Jaeson*, 3 Atk. 573; *Clifton v. Cockburne*, 3 Myl. & K. 76; *Pickering v. Pickering*, 2 Beav. 31; *Spode v. Smith*, 3 Russ. 511.

That payment is not conclusive evidence of assets, see *Orr v. Raines*, 2 Ves. 194; *Young v. Walter*, 9 Ves. 365. An admission of assets to pay testamentary expenses and legacies, is an admission which embraces the costs. *Roch v. Callen*, 6 Hare, 531.

The payment of interest on a legacy for a period of ten years, it was held, must be considered as an admission of assets for the payment of the legacy. *Attorney-General v. Higham*, post, 634. But, where executors for three years paid on the plaintiffs legacies, at the first hearing, the Court directed accounts with the view of determining from the state of the assets, the liability of the executors to pay the legacies. On further directions, it refused to hold, that by payment of the interest, the executors had admitted assets, such a conclusion being wholly at variance with all that had been previously done in the suit. *Rowley v. Adams*, 7 Beav. 396.

Where assets are admitted by an executor, he thereby makes himself liable for the payment of the debt. In such cases, in a suit instituted by one creditor in behalf of himself and all other creditors, if the plaintiff's debt is admitted and there is an admission of assets, the plaintiff is entitled to a decree for immediate payment of his debt, as the other creditors cannot be prejudiced by such a decree. *Woodgate v. Field*, 2 Hare, 211.

Where a bill was filed for the recovery of a legacy, and the executors are called upon either to admit assets, or to render an account of the estate, if they, in their answer, neither deny the sufficiency of assets, nor set out an account of the estate, the Court will presume that the estate in their hands is sufficient for the payment of the legacy, and will make a decree accordingly. *Smith v. Smith*, 4 Paige, 271.

An admission of assets on a decree made in 1830, was sought to be avoided on special petition and petition for re-hearing in 1845. Held, that whether fraud or mistake had been committed, yet considering the circumstances of the case, the lapse of time, the transaction that had taken place, and the absence of documents and the imperfection of evidence, justice could not be done by a simple re-hearing as the cause stood in 1830. *Davenport v. Stafford*, 8 Beav. 503.

An actual admission of assets cannot, generally speaking, be got rid of; nor does it follow that accounts are to be taken in those cases, where, with the denial of assets, the answer discloses circumstances which show a personal liability for what is asked. *Rogers v. Souten*, 2 Keene, 600. *Savage v. Lane*, 6 Hare, 36.

If the bill prays for an account, and nothing more, the payment of legacies cannot

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of little or no value unless it amounted to an admission of assets. Possibly the maxim of construction, *ut res magis valeat quam pereat* might be held to apply. But, without relying on this, let us look at all the circumstances of the case together. The testatrix died in the year 1811. Her will was soon afterwards proved by both the executors. The legatee attained her majority, when she became entitled to the legacy, many years after the death of the testatrix; she then married. After her marriage, and more than fourteen years after the death of the testatrix, both the executors sign the memorandum, and by that memorandum, separately and jointly acknowledge to owe the husband of the legatee £150, being a legacy left to his wife, and £50 interest thereon. The memorandum is at least an admission that the legacy was not liable to any abatement, but that the whole sum was due, together with interest. The memorandum is accepted by the husband, who seems bound by it as to the amount of interest then claimable. When the length of time since the death of the testatrix is taken into consideration, in connection with all the other circumstances of the case, I find the doubt which I formerly entertained on the subject removed, and I cannot, I think, acting upon the principle to be extracted from the authorities, do otherwise than hold the memorandum to be equivalent to an admission of assets by both the executors.

Let the defendants pay to the plaintiff the amount found by the Master's [*322] report, dated the 15th November, 1842, to be due to the plaintiff, *for principal and interest on the legacy in the report mentioned, together with the costs of this suit, except so much thereof as relates to the claim for interest prior to six years before the filing of the bill in this Court, and also except the costs occasioned by the defendant James Clark's going into evidence as to the set-off, as in the Master's report mentioned, which latter costs are to be borne by him, and refer it to the taxing Master of this Court in rotation to tax the costs so directed to be paid as aforesaid in case the parties differ.—Liberty to apply.

be insisted upon by a creditor at the hearing, as making the executor personally liable for the payment of his debts. *Savage v. Lane*, 6 Hare, 33.

1843.—Pearce v. Gray.

PEARCE V. GRAY.

Bill by a party from whom a promissory note had been obtained for a gambling debt, to restrain an indorsee of the note, with, as it was alleged, notice of the consideration, from proceeding in an action at law, commenced by him against the plaintiff in equity for the recovery of the amount made payable by the note, and in which action the defendant in equity had declared. After the filing of the bill, and before any injunction had been applied for, the action at law was tried, and a verdict found for the defendant at law, the plaintiff in equity:—*Held*, on the hearing of the cause, that the judgment at law was not only admissible in evidence, but that it was conclusive in equity as to those facts as to which it was conclusive at law; but that, as the judgment was obtained after the defendant had answered, and no supplemental bill had been filed, the defendant in equity was entitled, if he thought fit to require it, to an inquiry whether the judgment had been fairly obtained.

ON the 9th February, 1841, the plaintiff John Pearce dined at Brighton with one James Augustus Grant and a friend. After dinner, cards were produced, and, eventually, the plaintiff became a loser to Grant of £3400. For this sum, the plaintiff at the time gave a memorandum or acknowledgment; but, six days afterwards, he signed and gave to Grant a promissory note in the following terms:

“£3400.

Brighton, Feb. 15, 1841.

On demand, I promise to pay to James Augustus Grant, Esq., or order, the sum of £3400 for value received.

“JOHN PEARCE.”

The plaintiff having reason to believe that he had been cheated at cards, on the 20th February, 1841, filed his bill against Grant for the delivery up of the note to be cancelled, and for an injunction to restrain Grant from negotiating it, and from commencing or promoting any action against the plaintiff upon or in respect of it. The plaintiff, on the day of filing the bill, obtained an injunction according to the prayer of it, but was unable to serve it on Grant, who never entered any appearance to the bill filed by the plaintiff.

*On the 6th March, 1841, the defendant Gray demanded payment of the note, and, on the same day, he commenced an action at law against the plaintiff to recover the [323]

1843.—Pearce v. Gray.

£3400 made payable by the promissory note, and on the 15th March he declared in such action. On the 6th April, 1841, the plaintiff filed his bill against the defendant Gray. The bill, after stating the facts, charged that the defendant Gray was informed, before he took the note, of the nature of the transaction, and that the plaintiff had not received a full consideration for the note, and that it was not indorsed to the defendant *bona fide*, or for a valuable consideration. The bill prayed that the defendant might be decreed to deliver up the note to be cancelled, and, in the mean time, might be restrained from negotiating it, and also from proceeding in the action commenced by him against the plaintiff, and from commencing or promoting any other action against him upon the note; and, if necessary and proper, that the bill in the present suit, as amended, might be taken as supplemental to that filed against Grant.

The defendant Gray, by his answer, admitted the possession of the note, for which, as he alleged, he had given a valuable consideration to one Gill without notice of the gambling transaction.

The note was produced on the hearing of the cause, but appeared to be indorsed in blank by Grant.

On the 2nd July, 1841, the action brought against the plaintiff in equity by Gray was tried, when a verdict was found for the defendant at law, the plaintiff in equity.

In this suit, the plaintiff entered into evidence to prove an examined copy of the judgment-roll in the action at law, and that Grant was out of the jurisdiction of the Court: the latter fact, however, which was proved by only one witness, was contradicted by the answer of the defendants.

The cause now came on for hearing.

[*324] Mr. *Russell* and Mr. *Dunn* objected to the case proceeding in the absence of Grant, who, they contended, was a necessary party; inasmuch, as it became necessary to decide whether the note was a valid note in the hands of Grant, and whether, under all the circumstances, it was not at all events, a valid note in the hands of the defendant Gray.

For the plaintiff, it was argued, that the objection was not

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raised by the answer, and it did not appear that Grant had any interest in the note.

The objection was overruled.

On the record of the judgment at law being offered in evidence on the part of the plaintiff,

Mr. *Russell* and Mr. *Dunn* objected, that the judgment was not in issue in the cause, and that evidence of it was therefore inadmissible:—that it was no evidence of the facts put in issue in the cause. And that it might have been obtained unfairly, or through mistake.

THE VICE-CHANCELLOR.—If at any stage of the cause the propriety or impropriety of the judgment at law can be discussed, this is not the time. The only question now is, whether it can be admitted as evidence. The weight to be given to it, when admitted, is another question. The bill alleges the bringing of the action and the delivery of the declaration; and the plaintiff, for the purpose of showing the state of the action, proves the record of the judgment. That the judgment was unfairly and improperly obtained (if it was so) may be an argument against its weight when admitted, but not against its reception as evidence. It is clearly admissible as evidence. It is another question whether, the judgment having been obtained since the institution of the suit, the defendant ought not to have some further opportunity of bringing forward and supporting any objections he may have to allege against the judgment.

The evidence was received.

*Mr. *Swanston* and Mr. *Toller*, for the plaintiff.— [*325] The judgment at law is conclusive as to the note being given for a gambling debt, and having been indorsed to the defendant with full notice of the illegal consideration given for it. And it is sufficient evidence for this Court to decree a perpetual injunction and the delivery up of the note to be cancelled as prayed by the bill. The judgment is substantially the same as if it had been a judgment in an action brought under the direction of this Court. There is no ground for pretend-

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ing that the judgment has been obtained through fraud or mistake, nor can anything be stated to take it out of the general principle applicable to a judgment on the same question between the same parties.

Mr. *Russell* and Mr. *Dunn*, for the defendant.—The proper bill was a bill for discovery only, and the prayer for the delivery up of the note is only added as matter of relief to avoid the payment of the costs of the discovery. There is no evidence in the cause of any gambling, nor have any of the facts alleged in the bill or even the memorandum been proved. It does not appear on what ground the plaintiff at law failed, and therefore the judgment cannot be taken as proof of any of the facts. It might have been obtained by accident or mistake. The plaintiff in equity never applied for an injunction. In *Jones v. Lane*,^(a) Baron *Alderson* states "that the result of an examination of the authorities seems to be, that if a party has wrongfully obtained possession of a bill of exchange, although under circumstances which would give a complete defence at law, equity will nevertheless interfere, if, from length of time or death of witnesses, such defence is likely to fail; but that if the objection, being apparent on the face of the instrument, must always be [*326] open to the defendant whenever such *action shall be brought against him, he is not compelled to apply to a court of equity for relief." The plaintiff comes here without any evidence at all, except that the plaintiff at law has not been able to succeed in his action; but this is not a sufficient ground for the decree which he seeks.

VICE-CHANCELLOR (without hearing the reply).—Ever since I have been acquainted with this Court, it has been the constant course of the Court to grant relief against securities given for gambling transactions.[1] In the present case, the judgment, standing unquestioned, precludes the fact of this being a gam-

[1] *Skipwith v. Strother*, 3 Rand. 214; *Gill v. Webb's Adm'r.* 4 Monroe, 299.

(a) 3 You. & Coll. 281. 294.

 1843.—Pearce v. Gray.

bling debt from being disputed. The question was a mere legal question, and the judgment has disposed of it.[2] But the judgment having been obtained after the answer, and no supplemental bill having been filed, bringing that fact before the Court, so as to enable the defendant to give any explanation of the circumstances under which the judgment was obtained, I will, if the defendant wishes it, send it to the Master, to inquire whether the judgment was fairly obtained.[3] The defendant will, however, take the reference at the risk of costs. If this inquiry is to take place, the Master may as well also inquire whether Grant was out of the jurisdiction when the present bill was filed, and whether he is now out of the jurisdiction. I am not quite certain that this inquiry is necessary. I should probably come to the same conclusion without it.

[2] That a judgment at law may be impeached in equity for fraud, but not on the ground of mere irregularity, and that it is a conclusive bar in equity; see *Shottenkirk and others v. Wheeler*, 3 Johns. Ch. 275; *De Riemer v. Cantillon*, 4 Johns. Ch. 85; *French v. Shotwell*, 6 Johns. Ch. 235; *Hawley v. Maucius*, 7 Johns. Ch. R. 174; *Kingsland v. Spalding*, 3 Barb. Ch. R. 341; *Fletcher v. Rapp*, 1 Smede & M. Ch. R. 374; *Armstrong v. Caldwell, et al.* 2 Seam. 420.

[3] That where a party has a good defence at law to an action commenced against him, but is prevented by a gross fraud of the plaintiff in the suit and others, from setting up that defence, and a judgment is obtained against him, without any negligence or fault on his part, a court of equity will relieve against the judgment. See *Higgins v. King*, 3 Barb. Sup. Ct. R. 616.

In *Boyd v. Moyle*, 2 Collyer, 324; it was held, that upon a bill filed by the assignee of a bankrupt against the judgment creditor of a bankrupt, impeaching the alleged amount of the judgment debt, and praying an account, it was a good ground of equitable relief; that, at the time when the action in which the judgment was obtained was commenced, the bankrupt was in pecuniary difficulties, and was pressed for the payment of his debts by several of his creditors, and that he was unable by reason of such difficulties to attend to the defence of the action.

In a case where a judgment was obtained against an executor, who, from the perplexed state of the assets and other causes was unable to plead at law, a court of equity will afford relief. *Pickett v. Steward*, 1 Rand. 478.

So, where an executor confesses judgment under a belief that the assets of the estate are amply sufficient to pay all claims against it; but afterward, by an unexpected depreciation of the property, the amount of the assets proves inadequate, relief may be obtained against the effect of the judgment in equity. *Miller's Ex'rs v. Rice*, 1 Rand. 438.

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LET the promissory note be deposited with the Registrar, and let the cause stand over for ten days for the defendant to elect whether he will take the reference.

March 15.—The defendant declining the reference, the record of the judgment was directed to be entered as read, and the decree was made according to the prayer of the bill.

[*327]

*HILLS v. HILLS.

1843: April 21st.

The Court will not, generally, decree a will to be established against a plaintiff infant heir.

THE bill was filed on behalf of the infant children of Thomas Hills deceased, who was the eldest son of the testator Daniel Hills, against the executor of the testator and other parties, for the purpose of having the real and personal estate of the testator administered. The real property had been devised upon trust for sale, and one moiety of the residuary personal estate, including the monies to arise from the sale of the realty, had been bequeathed to the plaintiffs, one of whom, George, was the heir-at-law of the testator.

Mr. *Dixon*, for the plaintiffs, observed, that the plaintiff George the heir-at-law of the testator, being an infant, the will could not be proved against him in this suit. *Nany v. Wynne*.(a)

Mr. *Elmsley* and Mr. *Rasch* appeared for the defendants.

DECREE that the administration accounts be taken without declaring the will well proved, or ordering the trusts of it to be carried into execution.

(a) In Chan. 1839. In this case, which was a bill filed by infants, one of whom was the heir-at-law of a testator, for the purpose of having the trusts of the will relating to the testator's real estates executed, a decree was made that the will should be established, and the trusts carried into execution. But upon appeal to Lord *Cottenham*, C., this part of the decree was struck out; his lordship observing that where an infant heir is plaintiff, the course is not to establish the will, but, if there be no question raised, to act under it as a will. A branch of this case will be found reported in the *Jurist*, Vol. 3, p. 498.

1843.—Hanson v. Lake.

*HANSON V. LAKE.

[*328]

1843: May 27th.

On a decree for specific performance against the infant heir-at-law of a vendor, the Court, where there has been no default on either side, will give no costs on either side.

THE plaintiff agreed by writing, dated the 17th March, 1842, to purchase a freehold estate of Richard Lake. The purchase-money was paid, and the plaintiff was let into possession; but before any conveyance was executed, and on the 12th May, 1842, Richard Lake died, intestate, leaving an infant heir-at-law.

The bill prayed, that the agreement might be specifically performed, and that the infant might be declared a trustee for the plaintiff, and decreed to execute a conveyance.

Mr. Glasse, for the plaintiff.

Mr. Collyer, for the defendant.

Upon the plaintiff's counsel asking for his costs, the *Vice-Chancellor*, after noticing the short space of time which had elapsed between the date of the agreement and the death of the vendor, inquired whether there was any authority for allowing a plaintiff the costs of the suit in such a case against an infant defendant?

Mr. Glasse mentioned *The Midland Counties Railway Company v. Westcomb*.(a)

THE VICE-CHANCELLOR said, that he thought there must have been some default in that case. Here it was admitted that there was no default on either side.[1]

DECREED an immediate conveyance. Let the purchaser bear his own costs of the suit. Let the infant have his costs out of the personal estate of the intestate, on the administratrix appearing and consenting to be bound by the decree.

(a) 11 Sim. 57

[1] That costs of a suit to compel a specific performance of a contract, will not be allowed to the plaintiff where there has been no application to the defendant, previous to the filing of the bill, to carry the contract into effect, and no refusal or neglect on

 1843.—Rider v. Jones

[*329] *RIDER V. JONES.—RIDER V. STURGIS.

1843: May 25th.

Upon a bill filed to set aside a mortgage security for fraud, circumstances of oppression and misconduct being proved against the mortgagee, it was held that, inasmuch as, if solvent, he would have been liable to pay part at least of the costs of the suit, being insolvent he was not entitled to receive costs[1]

The attorney of a mortgagee held the mortgage deed, claiming a lien upon it against his client, to an amount at least equal to the value of the security. The mortgagee took the benefit of the Insolvent Debtors' Act. Upon a bill filed by the mortgagor to set aside the security, or to redeem, the Court, on the application of the mortgagor, ordered the attorney, though not a party to the suit, but who appeared on a petition, to deliver the deed to the mortgagor, upon payment of what was due from the mortgagor under the security, in satisfaction of the lien.

The provisional assignee under the Insolvent Debtors' Act was made a defendant to a bill of which the object was to set aside a mortgage security taken by the insolvent from the plaintiff:—*Held*, under the circumstances of the case, that the assignee was not entitled to receive the costs of the suit from the plaintiff.

UNDER the will of Richard Brittain, Mary Rider was entitled for life to one undivided moiety of an estate mentioned in the pleadings, with remainder as to a one undivided seventh part to her daughter, Mary, in tail. The parties so interested contracted to sell their interests to a Mr. Heathcote, who, many years ago, was let into possession of the premises. In consequence, however, of difficulties in the title, the contract had not been completed, nor the purchase-money paid at the time of presenting the present petition.

In 1828, Mary Rider and her daughter employed Thomas Wyndham Jones as their solicitor, and, being in great distress,

the part of the latter to execute the contract; and where the defendant has not been guilty of any improper conduct, and has not improperly resisted the plaintiff's claim, see *Swarthout v. Burr*, 1 Barb. Sup. Ct. R. 498. For cases decided upon reasons analogous; see also *Dyer v. Potter*, 2 Johns. Ch. R. 152; *Brockway v. Wells*, 1 Paige Ch. R. 617; *Vroom v. Ditmas*, 4 Paige Ch. R. 526; *Slee v. Manhattan Co.* 1 Paige, 48.

[1] See *Branden v. Aston*, ante, 29; *Cliff v. Wadsworth*, post, 602, and cases cited in note a; *Wilson v. Cluer*, 4 Beav. 214; *Brinkerhoff v. Lansing*, 4 Johns. Ch. R. 65, 79; *Tiernan v. Wilson*, 6 Johns. Ch. R. 411; *Brockway v. Wells*, 1 Barb. Ch. R. 617; *Dorsey v. Smith*, 7 Har. & J. 345; *Vroom v. Ditmas*, 4 Paige, 527; *Park v. Peck*, 1 Paige, 477.

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procured from him, at various times, the loans of several small sums of money. Jones afterwards, at their request, applied to and obtained from Mr. Heathcote the annual payment of £50, in discharge of the interest due on the unpaid purchase-money for the estate. He also, under a written authority, signed by Mary Rider and her daughter, from time to time received from Heathcote the £50, and it was agreed that what he so received should be applied in payment of what might be due from them to him for monies advanced and business done.

In the course of these transactions Mary Rider and her daughter gave Jones two promissory notes for £30 each, and two acceptances for £50 each. Afterwards, in September, 1833, Jones, without any previous communication with them, prepared, and required them to execute to him, an indenture of mortgage of the premises, to secure £100 and interest. [330] Upon their refusal to do this he brought his action against Mary Rider on one of the acceptances, and arrested her. He also commenced proceedings on the other securities, but agreed to discontinue them upon his clients consenting to execute the mortgage, which they accordingly did. They subsequently executed to him a deed of further charge of the premises.

In July, 1836, Jones commenced an action against Mary Rider on her covenant, contained in the mortgage deed, for payment of the £100, and also an action against John Trelfa (who in the interim had married Mary Rider, the daughter,) on certain acknowledgments which he had given in respect of the foregoing transactions. These actions led to the present suit, in which the original bill was filed in April, 1837, by Mary Rider, and John Trelfa and Mary his wife, against Jones, alleging, that an open unsettled account existed between the parties in respect of monies received and paid by the defendant for the plaintiffs; that, upon taxing that account, a balance would be found due to the plaintiffs; and that, with respect to monies due to the defendant for business done, no bill of costs had been rendered to the plaintiffs, though frequently applied for. The prayer of the bill was, that the proper accounts might be taken, and the bills of costs examined and taxed; that it might be declared that the securities were fraudulently obtained, and might be delivered up to the

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plaintiffs; and that, if necessary, they might be let in to redeem the premises; and, for an injunction, to restrain the proceedings at law.

The plaintiffs having obtained an injunction, pursuant to the prayer of the bill, that injunction was continued by order; and by the same order the Master was directed to take an account of the dealings and transactions between the parties; with liberty to state special circumstances.

After this order was obtained, Jones became insolvent, and his estate and effects were vested in Sturgis, as provisional assignee under the Insolvent Debtors' Act. [331] Sturgis was brought before the Court by supplemental bill.

The Master afterwards made his report, whereby he found, that, under the written authority before mentioned Jones had received sums amounting to £170; that he had on the other hand, paid and advanced, on account of Mary Rider and her daughter, several sums of money; that he had also become entitled to be paid several sums in respect of his bills of costs (delivered since the commencement of the suit,) which bills of costs the Master had reduced from £146 to 66*l.* 3*s.* by disallowing all charges connected with the mortgage securities, and by taxation; and that the amount of monies so due to him was 196*l.* 3*s.* 10*d.* That there would therefore remain due to the defendant Jones, upon the balance of accounts, in respect of the several before-mentioned dealings and transactions, the sum of 26*l.* 3*s.* 10*d.*

It appeared from the schedules to the Master's report that, exclusively of Jones's demand for professional charges, there was due to him in the account between the parties at the time when he arrested Mary Rider, and also when he procured the execution of the mortgage security, the sum of £9 only, and that when he commenced the actions which were the subject of these suits, he had been overpaid, and that there was due from him to the plaintiffs on the same account the sum of £40.

Before the report was confirmed an offer was made by the plaintiffs to the defendant Sturgis, with the approbation of the Master, to pay him the balance of 26*l.* 3*s.* 10*d.* upon having the deeds of mortgage and further charge delivered up, and a con-

1843.—Rider v. Jones.

veyance of the premises to the plaintiffs. Sturgis, however, declined to accept this offer, but obtained an order for confirming the report, and an order for setting down the original and supplemental causes for hearing, for the purpose, as recited by the latter order, of obtaining the directions of the Court as to the payment of "the above-mentioned sum, and of Sturgis's costs of the supplemental suit. [*332]

The causes came on for hearing before *Knight Bruce*, V. C., in April, 1843, when his Honor declined to order the payment of the sum of 26*l.* 3*s.* 10*d.* to the defendant Sturgis, without the delivery up by him of the deeds of mortgage; but it being then alleged by the defendants' counsel that the deeds were in the possession of Mr. George Smith, the solicitor of Jones in this suit, who claimed some lien upon them as against Jones, an inquiry was directed upon that point, with liberty to any of the parties, within a given time, before the order for the inquiry should be drawn up, to apply to the Court.

The plaintiffs now presented their petition, praying that they might be at liberty to pay into Court the said sum of 26*l.* 3*s.* 10*d.*, and that thereupon the defendants and George Smith might be respectively ordered to deliver up and procure to be delivered up to the petitioners, the indentures of mortgage and further charge, and to re-assign and to release to the petitioners, Mary Rider and Mary Trelfa, the respective estates and interests created by the said indentures; and that the defendants and George Smith or one of them might be ordered to pay to the petitioners the costs of this application.

Mr. *Mathews* and Mr. *Pole*, for the petition.—[*The Vice-Chancellor* mentioned the case of *Bell v. Taylor*(a).] There is a general jurisdiction in the Court to control the defendant's solicitor in a case like this: *Bawtree v. Watson*.(b) This is a strong case. The whole is founded on defendant's own answer, his own admissions, and his own evidence. It reveals a course of most oppressive conduct by a solicitor towards a poor country client. The deeds must be delivered up, and the plaintiffs are entitled

(a) 8 Sim. 216.

(b) 2 Keen, 713; 3 M. & K. 339.

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[*333] to *their costs; and as Jones and Sturgis will not agree between them which is to receive the 26*l.* 3*s.* 10*d.*, one or other of them must pay the costs of this petition, which has been rendered necessary by their conduct.

Mr. *Follett*, for the defendant Sturgis.—This defendant is entitled to receive the costs of the suit and petition. If a mortgagor comes into equity to redeem, he must not only pay the costs of the mortgagee, but the costs of necessary parties occasioned by the dealing of the mortgagee with his security: *Wetherell v. Collins*.(a) This applies *a fortiori* to Sturgis, who is a public officer. In *Bawtree v. Watson* there was an actual decree; yet even there, the Court ordered him to be paid, and his costs added to the security. Here he comes in during the pendency of the suit.

Mr. *Daniel*, for the defendant Jones.—Upon the motion to dissolve the injunction an order was made by consent of this defendant that the accounts should be taken. The effect of that was, that various allegations of the misconduct of the defendant contained in the bill and negatived by the answer have not been put in issue. The consent of the defendant to have the accounts taken on an interlocutory proceeding, is a ground, amongst others, for allowing him his costs.

Mr. *Russell*, for Smith.—How can a plaintiff bring in the solicitor of the defendant and treat him as his own solicitor? In *Bell v. Taylor*. the deeds had got into the hands of the solicitor for the purposes of that suit, and there being no lien, it was held that the Court could order him to deliver them up. The principles of that case are not applicable here.

[*334] *Mr. *Matthews*, in reply.—The bill is not simply a bill to redeem, but to set aside securities as fraudulent. If Jones had not been insolvent he would have had to pay the costs of the suit. Sturgis, therefore, who has not disclaimed, but identifies himself with Jones, can claim no costs. As to Smith, the Court has a clear jurisdiction on general principles to order

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him to deliver up the deeds: but it may be doubted whether he has not waived any question as to the jurisdiction, by attending here and in the Master's office.

THE VICE-CHANCELLOR.—The result of the whole case is, that after some years of litigation, the plaintiffs are entitled to have the securities restored to them, and a reconveyance, upon payment of £26 and a fraction to one of the defendants; and it is agreed between the defendants and Mr. Smith, that, as between them, that sum belongs to Mr. Smith: Mr. Smith's also is the hand which holds the securities. Therefore, the plaintiffs must pay within a given time this sum to Mr. Smith; and let the decree or order be prefaced with a statement, that it is admitted at the bar, that, as between Sturgis, Jones and Smith, that sum belongs to Smith, to be paid in full satisfaction of all demands under the securities, or either of them. Upon payment being made, let Smith re-deliver the securities, (the deeds, bills, and notes) to the plaintiffs, and thereupon let Sturgis, and all other necessary parties (if any,) execute a reconveyance of the mortgaged property to the plaintiffs, or as they shall direct; the reconveyance to be settled by the Master, if the parties differ, and not to be parted with to the plaintiffs till further order. Reserve all costs subsequent to the present time, with liberty to apply.

As to the costs of the suit to the present time, considering the nature of the securities, the circumstances under which they appear to have been obtained, the nature of the actions, and the amount of the debt, it is plain, that *this cannot [*335] be considered as a common mortgage case. I do not approve of some of the circumstances which have taken place, and if Jones were not insolvent, I should have thrown part at least of the costs upon him; but he being insolvent, and not paying the costs, the question arises whether he is entitled to receive any costs. I am of opinion that he is certainly not so entitled, except as to the petition. Considering the position in which he stands, the nature of the petition, and its prayer, Jones must have the costs of the petition. These the plaintiffs must pay, I—say it with reluctance; but let them be added to their own costs, for there is a view in which that may possibly be useful to them.

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Jones is not to have any costs in the Master's office from the plaintiffs.

As to Sturgis, it is true that he comes in as a public officer in right of Jones the insolvent ; but he had full opportunity of making himself master of the case. He might have disclaimed, and thereby have saved expense. But he appears to have taken up the litigation as a contending party. The litigation is decided substantially in the plaintiffs' favor. I must leave him therefore to take his own costs, out of the insolvent's estate, of the suit generally to the present time, including the costs of the petition.

Then, with respect to Mr. Smith. Considering the nature of the case, I remain of opinion that Mr. Smith should have the costs of the petition from the plaintiffs ; by which I mean, strictly and merely the costs of the petition ; not of any proceedings in the Master's office. The plaintiffs are not to pay the costs of investigating that lien which Smith claimed against other persons.

As to the plaintiffs' costs, including the costs which they pay to Jones, and to Smith—and also as to Smith's costs which

I do not direct to be paid by the plaintiffs—they
 [*336] *must be paid out of the insolvent's estate. The insolvent has been substantially in the wrong. Let the injunction be made perpetual. As to the costs at law, I say nothing.

After the case had been disposed of, the case of *Baker v. Henderson*(a) was referred to.

MEGGISON V. FOSTER.

1843 : May 27th.

A person gave a bond for £5000 to his sister, but failing to pay the interest due on that bond, gave her another bond to secure the arrears of interest. He afterwards deposited with his sister the title-deeds of his real estates "as a collateral security

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for the bond debts." Subsequently, in contemplation of the marriage of the sister, the two bonds were, with the consent and privity of the obligor, settled upon trusts for the benefit of the intended husband and wife; no reference, however, being made in the settlement to the deposit of title-deeds. The marriage took effect, and about four years after, the obligor became bankrupt:—*Held*, that, assuming the consideration for the first bond to have been voluntary, yet there being no fraud suggested against any party, or insolvency proved against the obligor, the settlement was a valuable security; and that by virtue of the bonds, the instrument of deposit, and the settlement, the trustee of the settlement was equitable mortgagee of the real estate for the moneys due on the bonds.[1]

The circumstance that the Court of Bankruptcy has concurrent jurisdiction in the case, is not a necessary ground for refusing costs to a party seeking the assistance of a Court of Equity.

IN February, 1826, William Smith Batson executed to his sister Elizabeth Maria Batson a bond to secure to her the payment by the obligor of the sum of £5000 and interest on the 25th August following.

On the 1st December, 1835, Batson, in consideration of the arrears of interest on the before-mentioned bond, and of some small sums due from him to his sister, gave her a bond for £1000 and interest. This bond was made payable on the 1st June, 1836.

On the 9th December, 1835, Batson deposited with his sister the title-deeds of an estate belonging to him, and at the same time gave her a memorandum in these words:

"Newcastle, 9th December, 1835.

"I deposit these deeds of my estate of Higham Dykes
*with my sister Elizabeth Maria Batson, as a collateral [*337]
security for my bond debts due to her.

"W. S. BATSON."

By an indenture, dated the 29th February, 1836, and made in contemplation of a marriage then agreed upon between Elizabeth Maria Batson and S. S. Meggison, the bonds and the monies secured thereby were assigned to William Clayton Walters, in trust for Elizabeth Maria Batson for her separate use during the joint lives of herself and her intended husband, and in case she

[1] See *Eds v. Knowles*, ante, page 172, and notes to that case.

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should survive her intended husband, in trust for her absolutely ; but in case she should die in his lifetime, in trust for her intended husband for life, and after his decease as she should by will, notwithstanding her coverture, appoint, and in default of appointment to such persons as by virtue of the Statute of Distributions would at her death have been entitled to her personal estate as her next of kin in case she had died a widow and intestate. The settlement contained a proviso that the sums secured by the bonds should not be called in during the lifetime of W. S. Batson, nor after his decease, except upon the request in writing of the intended husband and wife, or the survivor. No notice was taken in the settlement of the deposit of deeds or the memorandum.

The settlement was made with the privity and consent of W. S. Batson, and the marriage, which took effect soon after, was likewise had with his consent. The interest on the £6000 was regularly paid from the date of the settlement to the bankruptcy of Batson, which took place in December, 1841.

The bill, which was filed by the husband and the trustee of the settlement against the assignees of the bankrupt, the wife, and other parties, prayed that the estate, the title-deeds [*338] of which had been deposited, might be sold, *and that out of the purchase-money the money due in respect of the bonds might be paid to the trustee, or that the assignees might be absolutely foreclosed.

The assignees by their answer admitted that the settlement was made with the privity and consent of Batson, but insisted that at the times of the execution of the bonds and the deposit of title-deeds he was in insolvent circumstances.(a) No fraud, however, upon the creditors or otherwise was suggested.

The case having been opened for the plaintiffs, it was noticed that some of the defendants who had been served with a copy of the bill, pursuant to the 23rd of the Orders of August, 1841, did not appear by counsel. The *Vice-Chancellor* expressing some doubt whether the cause could proceed in their absence, the plaintiffs' counsel undertook to appear for them.

(a) See 6 Geo. 4, c. 16, sect. 73.

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Mr. *Wigram* (with whom was Mr. *Bates*,) for the plaintiffs, observed that whether the first bond was voluntary or not, the second bond, the deposit, and settlement were securities for value. [He was then stopped by the *Vice-Chancellor*, who, in calling upon the defendants' counsel, told them that they might assume, for the purpose of their argument, that the first bond was merely an act of bounty from a brother to his sister.]

Mr. *Russell* and Mr. *Toller*, for the defendants, the assignees. — Bankruptcy destroys the previous right under the securities. In the Court of Bankruptcy the trustee could have no right to hold a voluntary security; and it must be the same in this Court for the purposes of this cause. There may indeed be some difficulty in contending that the second bond could not be proved under the fiat; but the first was purely voluntary. [*The Vice-Chancellor*.—“A voluntary gift, secured [*339] by a deed upon which an action may be brought immediately, is a valuable security.”] We submit that it is not such a security as can be enforced in the administration of bankruptcy; add to which the obligor was insolvent at the time.

If the bonds were voluntary, the settlement could not alter the nature of the property; for no valuable consideration passed from the obligor. He was not in *loco parentis* to his sister. Besides, the lands in question are not specifically affected by the settlement; for, singularly enough, it takes no notice of the deposit.

THE VICE-CHANCELLOR.—I see no difficulty in this case, in my view of the law. A gentleman in circumstances of solvency gives a bond (which for the sake of argument may be taken to be voluntary) for £5000 to his sister—under circumstances of perfect fairness—under circumstances preventing the possibility of his asserting any claim to relief against it. Interest accrues due upon it, and in the course of years he gives his sister a bond for what, on a rough calculation, the arrears amount to, with or without some small additional consideration. This bond has not, as I understand, been contended to be voluntary further than as the whole part of the consideration for it consisted of arrears due on the former bond. It is suggested that when this was done

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he was not solvent, but it is not suggested that he had committed an act of bankruptcy—it is not suggested that he contemplated bankruptcy—it is not suggested that there were any circumstances of dishonesty or unfairness in the transaction ; which I must therefore treat as a transaction open, honest, and fair.

Subsequently to this bond, but as an entirely distinct matter, the bankrupt of his own accord deposited the title-deeds of a real estate with his sister, as obligee in the bonds, voluntarily, as it appears, except as that term *may be excluded by the mere existence of the bonds, and not bargaining for any benefit by reason of the deposit—the deposit being fairly made, and any notion of bankruptcy being still out of the question. In the course of a month or two afterwards the sister marries, with the knowledge and consent of the brother. With the same knowledge and consent the two bonds are made the subject of settlement, and the settlement contains a clause, which the sister inserts for the protection of the brother against her husband and the trustee, to save him from being sued when it might be inconvenient to him to pay. An observation has been made that it is singular that the mortgage was not mentioned in the settlement. That observation, however, comes to nothing when it is admitted that there was no unfairness in the transaction, for the omission can only be of service to the argument of the assignees as evidence of unfairness. Under the circumstances which I have stated—four years or more having elapsed since the settlement—the brother becoming a bankrupt, it is suggested as doubtful whether the benefit of this security can be obtained for the parties interested under the settlement. I have no doubt upon the subject.

DECLARE that, by virtue of the bonds, the instrument of deposit, and the settlement, the plaintiff, William Clayton Walters, is the equitable mortgagee of the real estate for principal and interest due on the bonds. Take an account of what is due for principal and interest on the bonds.

Mr. *Russell* then submitted that the plaintiffs were not entitled to their ordinary costs as mortgagees, inasmuch as they might have applied to the Court of Bankruptcy ; and he referred to a case where, under similar circumstances, Sir *John Leach* had refused a plaintiff his costs.

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THE VICE-CHANCELLOR said, that at that time the right of appeal as to matter of fact was not limited by the *Bankrupt Law. That, and other circumstances, distinguished the present case from the case which had been referred to. His Honor, therefore, was of opinion that the plaintiffs were entitled to their costs. [341]

DUPUY V. TRUMAN.

1843: June 2nd.

The cashier of a banking-house, upon his examination as a witness, stated that he had ascertained from the clearing book, kept by him, and in his own hand-writing, that a certain sum of money was paid in notes of a particular description. The statement was founded solely on the witness's knowledge of the book and of his own hand-writing, and not from any recollection of the fact deposed to; and the book was not produced:—*Held*, that, under these circumstances, the statement could not be received as evidence of the fact deposed to, though it might serve as a ground for further inquiry.

THE plaintiff, Mrs. Dupuy, being advised by her friends to purchase terminable annuities, directed her stockbrokers, with that view, to sell certain stock which she had in the new 3l. 10s. per cents. This they accordingly did, and paid the money produced by the sale of Mrs. Dupuy's account, at Messrs. Hoares bank.

The bill alleged, that Mrs. Dupuy having great confidence in the defendant, Dr. Truman, and intending to make him sole trustee of the terminable annuities for her use, gave him a cheque for £3000 on Hoare's, which he invested in terminable annuities, pursuant to her request; but that he afterwards sold those annuities, and applied them to his own use.

In order to trace the stock through the hands of the defendant, and for that purpose to prove that the money paid by Messrs. Hoares to the defendant was paid in particular bank-notes (those notes being afterwards handed to his stock-broker,) the plaintiff's counsel proposed to read the evidence of Mr. Palmer, a cashier

 1843.—Dupuy v. Truman.

at Hoare's bank. This witness after identifying a cheque for £3000, signed in the plaintiff's name, as one which he had himself cancelled, from which circumstance he inferred that he had paid it, proceeded to give his evidence as follows:—"I have ascertained by reference to the clearing-book, kept by me, as one of the cashiers of the banking-house, for the purpose of entering the particulars in which cheques or orders for *money are paid or cashed by me, on behalf of the said house, that the sum of £3000 was paid in the following Bank of England notes: viz. two for £1000, each numbered respectively, &c. &c. The memorandum in the said clearing-book as to the particulars of the said notes is in my hand-writing, and was made by me in the usual course of business, at the time of the said payment of the £3000 being made."

It did not appear that the clearing-book had been produced at the examination of the witness; and it was admitted by the plaintiff's counsel that the witness's belief of the fact deposed to arose only from his reference to that book.[1]

THE VICE-CHANCELLOR, after adverting to the distinction in cases of this nature stated in *Phillipps on Evidence*,(a) said that in his opinion a sufficient foundation had been laid for an inquiry before the Master, if the plaintiff desired it; but as the case then stood, there was no evidence to show that the cheque was paid in any particular notes.

Mr. Russell, Mr. Roupell, and Mr. Romilly, for the plaintiff.

(a) Vol. 2, p. 412, 9th ed. See *Doe d. Church v. Perkins*, 2 T. R. 749; *Res v. St. Martin's, Leicester*, 2 Ad. & Ell. 210; *Burton v. Plummer*, id. 341.

[1] Where a witness recollects having seen a writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers, that at the time he saw it, he knew the contents to be correct. In this case, the writing itself must be produced in Court, in order that the other party may cross examine; not that such writing is thereby made evidence of itself, but that the other party may have the benefit of the witness's refreshing his memory by every fact. See *Sinclair v. Stevenson*, 1 C. & P. 582; *Lloyd v. Freshfield*, 2 C. & P. 325; *Greenleaf on Evidence*, Vol. I, § 437; see also *Cowen & Hill's Notes to Phil. on Evidence*, note 598.

1843.—Dupuy v. Truman.

Mr. *Simpkinson*, Mr. *Moore*, and Mr. *Campbell*, for the defendant.

*BATTEN V. PARFITT.

[*343]

1843 : June 9th.

Under an act of Parliament the real estates of a testator were vested in trustees upon trust to sell, and after applying the purchase-monies received for the respective estates in discharge of the incumbrances affecting them respectively, to pay the surplus monies into the Court of Chancery, there to be applied in payment of the testator's debts in a due course of administration. The various classes, and also the individual names of creditors were specified in schedules to the act. On a bill filed by the assignee of a specialty creditor on behalf of himself and all other the creditors of the testator, to have the trusts of the act carried into execution :—*Held*, that it was not necessary that all the scheduled creditors should be made parties to the suit.

IN 1825, Rogers and Rocke purchased of Ham, Granger, and Seaton, for four years, the right of working a patent for making vinegar. This purchase was carried into effect by means of a deed, dated the 18th of July, 1825 ; the consideration for the purchase being the sum of £2600, payable by half-yearly instalments of £325 each secured by the covenant of Rogers and Rocke. The benefit of this purchase soon afterwards became, by an arrangement, vested in Ham only.

In July, 1826, the partnership between Rogers and Rocke was dissolved ; Rocke taking the stock and credits, and undertaking to pay the debts of the firm.

In April, 1827, Rocke died, leaving a widow and three infant children, namely, two daughters and a son, and having, by his will, devised certain specified parts of his real estates to his widow and daughters, and the residue to his son.

At Rocke's death several instalments of the before-mentioned sum of £2600 were due.

In September, 1827, a commission of bankrupt issued against Rogers, under which he was declared a bankrupt.

On the 27th June, 1828, an act of Parliament passed, where-

1843.—*Batten v. Parfitt*.

by, after reciting the will of Rocke, his death, the state of his family, that at the time of his death he was a trader within the meaning of the bankrupt laws, and was indebted in sundry large sums secured by mortgage, in sums secured by bonds and other specialties, and in sums by simple contract, the dates and particulars of which debts appeared in the schedules to that act, numbered 2, 3, 4, and 5, respectively, and also reciting that the testator's personal estate was insufficient for payment of his debts

&c., it was enacted that the several real estates specified [*344] in the first schedule to the act should be vested in *Peter

Lewis Parfitt and Samuel Pratt, their heirs &c., in trust to sell, and, after applying a sufficient part of the purchase-moneys in discharge of the several mortgages and incumbrances affecting the estates respectively, to pay the surplus monies into the Court of Chancery, to be applied, on the petition of any party interested, first, in discharge of the expenses of the act, then in satisfaction of the residue (if any) of the mortgage debts, then in payment of the other debts of the testator in a due course of administration, and ultimately for the benefit of the parties entitled under the will.

The act contained a general clause saving the rights of all parties except the devisees, and persons claiming under them.

Schedules 2, 3, 4, and 5 of the act comprehended the respective classes of creditors. In each class the names of the individual creditors, about fifty in number, were mentioned. Schedule 3, which related to the specialty creditors, comprised the debt under the indenture of the 18th July, 1825. It was described as a debt for five instalments due in respect of a sum of £2600, secured by covenant from the testator to Ham, Granger, and Seaton.

By indentures dated respectively in July, 1825, August, 1835, and December 1838, the due debt to Ham became vested in the plaintiff.

In July, 1837, a report was made in the matter of the act, whereby it was found that a large sum of money was still due from the testator's estate, and that the plaintiff's debt, including arrears of interest, amounted to about £2058.

In 1841, the plaintiff filed the present bill alleging that he had

 1843.—*Batten v. Parfitt*.

received but a small dividend in respect of what was so due to him, charging that the trusts of the act of Parliament had been only partially performed, several of the estates remaining unsold, and praying that they might be fully carried into execution.

*The bill was filed by the plaintiff on behalf of him- [*345] self and all other the creditors of the testator against the trustees under the act of Parliament, the devisees under the testator's will, the assignee under the bankruptcy of Rogers, and Ham, Granger, and Seaton.

The cause now coming on for hearing,

Mr. *Rasch*, for the defendant Pratt, one of the trustees, submitted that all the scheduled creditors ought to have been made parties to the suit. *Calverly v. Phelps*,^(a) *Newton v. Earl of Egmont*.^(b)

Mr. *Wigram*, for the plaintiff, referred to *Walwyn v. Coutts*,^(c) and *Garrard v. Lord Lauderdale*.^(d)

Mr. *Piggott* appeared for other parties.

THE VICE-CHANCELLOR overruled the objection.

SMITH V. LYNE.

1843: June 10th.

A person transfers a sum of stock into the names of trustees, and by an indenture under his hand and seal, declares that the stock shall be held by the trustees upon certain trusts for the benefit of A. and her children by the settlor. The settlor afterwards obtains from the trustees a re-transfer of the stock to himself and razes the seals from the deed. By his will, not referring to the deed, he gives A. an annuity and other benefits, and the residue of his estate to the children: A. is entitled to the provision made for her both by the deed and the will.

IN the year 1827, and for some time previously, the plaintiff, a single woman, cohabited with Philip Lyne, by whom she had

(a) 6 Madd. 229. (b) 4 Sim. 574. (c) 3 Mer. 707; 3 Sim. 14. (d) 3 Sim. 1.

 1843.—Smyth v Lyne.

two sons, called respectively Philip Lyne and Thomas Lyne, who were born on the 18th August, 1826.

On the 9th April, 1837, Philip Lyne, the father, caused [*346] *to be transferred into the joint names of Charles Philip

Lyne, and Henry Moreton Dyer, a sum of £3166, £3 per Cent. Consols; and by an indenture of that date, made between Philip Lyne of the one part, and the trustees of the other part, and duly executed by Philip Lyne, after reciting that Philip Lyne was desirous of making some provision for the plaintiff, and also for her infant twin children, and, for that purpose, had that day transferred into the names of the trustees the before-mentioned sum of £3166 stock, upon the trusts thereafter expressed; it was witnessed and declared, that the trustees should stand possessed of the stock, upon trust to pay the dividends thereof to the settlor for his life, and after his decease to pay the dividends to the plaintiff for the maintenance of herself and the children, till the latter should have attained the age of nine years, if the plaintiff should so long remain unmarried, and have no other issue; and after the children should have attained that age, upon trust out of the dividends to pay £60 per annum to the plaintiff for her life, in case she should remain unmarried and without having any other issue, and the residue of the dividends for the maintenance and education of the children, as the trustees should think fit, until they should attain twenty-one; and upon their attaining that age, then as to the whole stock, subject to the annuity of £60, upon certain trusts for the benefit of the children and their issue; and in case both the children should die under the age of twenty-one without leaving lawful issue, then in trust, subject as aforesaid, for the executors and administrators of the settlor.

It appeared from the plaintiff's bill that Philip Lyne did not communicate to her the fact of his having made this settlement, but that, shortly after the date of its execution, he delivered to her a sealed parcel, with an indorsement to the effect that it was for her, and to be opened after his death; that, upon opening this parcel, which the plaintiff did soon after the receipt [*347] of it, she found therein a *copy of the indenture, but that,

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from fear of giving offence, she made no mention to the settlor of what she had done.

For some time after the execution of the settlement, Philip Lyne received the dividends of the £3166 stock, by means of a power of attorney granted to him by the trustees. In September, 1835, he procured the trustees to transfer the whole of the stock into his own sole name. He at the same time tore off the seals, from the indenture of settlement.

By his will, dated the 28th March, 1840, Philip Lyne, after appointing Charles Philip Lyne, Henry Moreton Dyer, William Sowton, and John Henry Deffell, his executors, and disposing of an advowson therein mentioned, gave to the plaintiff, who was described as then living with him, the sum of £20 to be paid immediately after his decease; and after making certain specific bequests to his sons Philip and Thomas, the testator gave to the plaintiff, during her life, the usage of, but not the absolute property in, or any disposing power over, all such of his goods and effects as, at the time of his decease, should lie in or about the cottage or dwelling-house at Compton, then occupied by her father, Thomas Soane Smith: and he directed that the trustees for the time being of his residuary estate should, within two calendar months after his decease, if the plaintiff required it, provide a comfortable cottage and garden, in or near the parish of Westbourne, for the residence of the plaintiff, and should pay the landlord a rent not exceeding £12 per annum for the same, and expend in and about the taxes and repairs of the said cottage, an annual sum not exceeding £5, if requisite, and permit, and suffer the plaintiff to use and occupy the said cottage and garden with the appurtenances, during her natural life, if she should think proper to reside therein. But it was his intention, and he expressly directed, that if the plaintiff*should [*348] marry, or if she should become the mother of other children, or if she should demise, let, or part with the possession of the said premises, or any part thereof, or if the said premises, or any part thereof, should be seized or taken by virtue or in consequence of the insolvency of the plaintiff, or of any legal or equitable proceeding whatsoever, then, in either of the said cases, he directed that the said tenancy should be determined by his

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said trustees, and the said respective annual payments by them should be discontinued by them. And the testator directed that his said trustees should purchase, or set apart and appropriate, out of his residuary trust estate, or the produce thereof, so much stock in the £3 per Cent. Consolidated and £3 per Cent. Reduced Bank Annuities, respectively, as at the time of his death would, together, be sufficient to secure to the plaintiff during her natural life, the due and punctual payment of one clear annuity of £40 by equal quarterly portions of £10 each; and that, until such appropriation should have actually taken place, an annuity to that amount should be paid out of the general income of his residuary estate. The testator then, after devising various parts of his real and leasehold estates to different devisees, amongst which were estates in the island of Horney and Westbourne, and other parishes in the county of Sussex, which he devised to his said sons, Philip and Thomas, in tail, devised all other his freehold, copyhold and leasehold estates, to the use of the said Henry Moreton Dyer, William Sowton, and John Henry Deffell, their heirs, executors, administrators, and assigns, upon trust to sell the same, and lay out the monies arising from such sale, and all monies arising from his personal estate after payment of his just debts, his funeral and testamentary expenses, and the pecuniary legacies bequeathed by his will, or to be bequeathed by codicil, in the purchase of £3 per Cent. Consolidated Annuities, in the [*349] joint names of the said *trustees; and, out of the dividends of such stock, he directed the trustees to pay three several annuities of £30 and £20 to his sisters, and one of £12 to the father and mother of the plaintiff, (for whose use he directed a cottage to be reserved, and kept in constant repair,) and subject thereto bequeathed the whole of such stock, (after payment of his debts, funeral and testamentary expenses, and legacy duties, and all other expenses from time to time incident to the performance of the trusts of the will,) upon certain trusts for the benefit of the testator's said sons, Philip and Thomas, and their issue. And the testator gave various powers to the trustees with respect to the maintenance, education, and advancement of his said sons.

The testator, by codicil, bequeathed several pecuniary lega-

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cies, but did not otherwise alter or revoke his will. He died in November, 1840, leaving his two sons, Philip and Thomas, surviving him; and in January, 1841, his will was proved by all the executors. In January, 1842, the bill was filed by the plaintiff, for the purpose of having it declared that she was entitled both to the provision made for her by the settlement, and that made for her by the will, and that the same might be secured for her benefit.

The indenture of settlement, with the seals torn off, was found amongst the testator's papers at the time of his death.

The executors, by their answer, admitted assets of the testator sufficient to answer the plaintiff's claim, provided the Court should be of opinion that the testator's estate was liable thereto.

Mr. *Wigram* (with whom was Mr. *Jackson*,) for the plaintiff, observed, that the trustees had been guilty of a breach of trust, to which the testator was a party, and, consequently, that his estate was indebted to the trust to the "extent of the [*350] sum secured by the settlement. There was nothing to show that the provision made for the plaintiff by the will was in satisfaction of that provided for her by the settlement.

Mr. *Teed* and Mr. *Piggott*, for the executors.—The settlement was never communicated to the plaintiff by the testator. After he had executed it, he changed his intention, procured a re-transfer of the stock to himself, and cancelled the deed. It must be admitted, that when he made his will he was, in a sense, debtor to the trust. He was under a moral obligation to provide for the plaintiff and her children. But he intended to substitute one provision for the other. It cannot be considered as a case of double portions. The fact that he destroyed one provision must satisfy the Court that such was his intention. [The *Vice-Chancellor*.—There is no evidence of any declaration to that effect.] The deed can be considered no more than a covenant to make provision for the plaintiff, and the covenant is carried into effect by the will.

THE VICE-CHANCELLOR.—I am unable to discover any seri-

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ous question in this case. A trust is created,—a valid and binding trust,—affecting a fund for which the author of the trust afterwards becomes indebted to the *cestui que trust*, or to the trustees, and through them, to the *cestui que trust*. He then makes his will, by which he gives certain benefits to the *cestui que trust*. The case is not one of satisfaction, nor do the principles applicable to such cases apply to it. Nor is it like the case of a legacy to a wife or legitimate children. From the nature of the present case, the Court, in disposing of the question, can only look to the terms of the will.

If the testator had meant the provision made for the [351] plaintiff by the will to be in satisfaction of demands *which she had against him, he might have so said. When he made the will he had the parchment in his possession, and therefore it may be presumed, that he had the subject present to his mind; but it is clear that he has said nothing about in his will. The plaintiff is entitled to both provisions.

GODKIN V. MURPHY.

1843: June 12th.

Testator bequeathed the residue of his personal estate to his wife for life, and after her decease to his sister for life, for her separate use, and after her decease to such person or persons as under the Statute of Distributions should be legally entitled to the same:—*Held*, that there was no intestacy as to the residue after the death of the sister, but that it was bequeathed either to the next of kin of the testator living at his death, as joint-tenants, or to the next of kin of the testator, or of the sister, living at the death of the sister, as tenants in common; and consequently that the wife, who died in the sister's lifetime, was not entitled to any thing beyond a life interest in the residue.

ALEXANDER MACDONALD being possessed of considerable personal estate, including chattel leaseholds, by his will, dated the 8th June, 1839, after directing payment of his debts, testamentary and funeral expenses, bequeathed to his wife, Elizabeth Macdonald, all his personal estate and effects whatsoever, and wheresoever, to hold the same to the use of his said wife for life, and

 1843.—*Godkin v. Murphy.*

after her decease he bequeathed the same to the use of his sister Sarah, the wife of Edward Godkin, for life; and he directed that the rents, issues, and profits, interest, dividends, and annual produce of his said estate and effects should be paid to his said sister, independently of her then present or any future husband, her receipt alone to be a sufficient discharge for the same: and he thereby declared, that after the decease of his said sister, his said estate and effects should remain and be to the use of such person and persons as, under the Statute of Distributions, should be legally entitled to the same. And he appointed his wife and George Murphy his executrix and executor.

The testator died on the day of the date of his will; and it was alleged that his wife died a few days after, without having proved the will.

*The bill was filed by the testator's sister, Sarah God- [352] kin, against the executor, the plaintiff's children, who were all alleged to be out of the jurisdiction, and her husband, Edward Godkin, for the purpose of having the rights of the parties interested under the will declared, and the necessary accounts taken of the testator's personal estate.

The cause now came on for hearing, and the principal question was, upon the meaning of the words, "such person and persons as under the Statute of Distributions shall be legally entitled to the same."

Mr. *Daniel*, for the plaintiff.—If this expression refers to the next of kin of the testator living at his death, the plaintiff is entitled to the residue absolutely. She was the sole next of kin of the testator at his death: and although the will, in terms, gives her a life interest only in the residue, yet that is not sufficient to exclude her from taking a larger interest, if she comes within the description of persons mentioned in the will for that purpose. [*The Vice Chancellor* referred to *Pearce v. Vincent*.(a)] It may be said, however, that the words have reference to the next of kin of the testator living at the plaintiff's death. If so, the case will possibly be governed by *Briden v. Hewlett*,(b) *Butler v.*

(a) 2 Keen, 230; 2 M. & K. 800.

(b) 2 M. & K. 90.

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Bushnell,^(c) *Clapton v. Bulmer*,^(d) *Harrington v. Harte*,^(e) *Long v. Blackall*.^(f) At all events it is submitted, that the representative of the wife is not entitled. If she was originally included in the gift, the gift was in joint tenancy, and the plaintiff has survived her: *Withy v. Mangles*.^(g)

Mr. A. G. Young appeared for the executor

[*353] "THE VICE-CHANCELLOR, after observing that it was not necessary, at present, to decide every point which had been argued, said—It seems to me that the testator, by using the particular words in question, may fairly be considered to have intended something else than intestacy—something beyond that which would have taken place if he had said nothing. If that be so, he must be taken to have meant one of two things, which would equally exclude the widow—either a joint tenancy and not a tenancy in common or a tenancy in common amongst those, if more than one, who may be alive at the death of his sister.

INQUIRE whether the testator's widow is living or dead, and, if dead, when she died. Inquire whether the defendants, the children of the plaintiff, were when the bill was filed, and are now, out of the jurisdiction. Inquire who are now the testator's next of kin; who would be the next of kin of the testator if the plaintiff were now dead, and who would be the next of kin of the plaintiff if she were now dead. These inquiries to be without prejudice to the construction of the will. And if the Master shall find that the widow is dead, that the defendants, the children of the testator, were, at the time the bill was filed, and are now, out of the jurisdiction; that the persons who are now next of kin of the testator, the persons who would be next of kin of the testator if the plaintiff were now dead, and the persons who would be next of kin of the plaintiff if she were now dead, are parties to the suit, then take the usual accounts of the personal estate in an administration suit.
Reserve further directions and costs.

(c) 3 M. & K. 232.

(f) 3 Ves. 486.

(d) 10 Sim. 496; 5 M. & Cr. 108.

(g) 4 Beav. 358.

(e) 1 Cox, 131

1843.—*Miln v. Walton*.

*MILN V. WALTON.

[*354]

1843: June 12th, 13th, and 29th.

A person purchased a ship of C, in consideration of three bills of exchange, which he indorsed, and delivered to the vendor. He about the same time wrote an order to his agent W., directing him to pay the amount of one of the bills, £750, to C., out of the freight of the ship. By a subsequent written order, he directed W. to satisfy out of the freight, the amount of *any current bills* given by him in payment for the vessel. W., after accepting both orders, discounted for C. the £750 bill:—*Held*, upon the construction of the orders, and the circumstances of the case generally, that the second order was not a revocation of the first, and that the lien of W. on the freight, for the amount of the £750 bill, was prior to that of the holders of the other bills.

A creditor having a mortgage on the funds of his debtor for part of his debt, does not necessarily surrender that mortgage or lower its priority, by taking a subsequent mortgage on the same funds for the whole of the debt.

A., a creditor, having a security for his debt upon funds of the debtor, takes afterwards, either alone, but on behalf of himself and B., another creditor of the same debtor, or jointly with B., a security for both debts, on the same funds which were the subject of A.'s separate security: A. does not thereby necessarily relinquish the separate security, or alter its precedence.

In April, 1841, Henry Castle, being owner of the barque Elizabeth, and being indebted to the Dundee Union Bank in a considerable sum of money, assigned to Henry Keil as the manager of such bank, 32-64th parts of the before-mentioned vessel, as a security for the sum due. The bill of sale was absolute, and the shares so assigned appeared in Keil's name in the register, but it was understood between the parties to be a mortgage transaction only.

In May, 1841, Castle contracted to sell the ship to Alexander Gopsell Pooley. The consideration for the purchase was £400 in ready money, and bills of exchange to the respective amounts of £1424. 10s., £700, and £750, drawn by Alexander Gopsell Pooley upon, and accepted by, Thomas Pooley, payable to the order of A. G. Pooley. The bills were of various dates, and were indorsed generally by Alexander Gopsell Pooley. They were afterwards indorsed generally by Castle; the two former being delivered to Keil, and the latter remaining with Castle till his delivery of it to Walton, as after mentioned.

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The bills being dishonored, and the ship being seized and sold under a process and decree of the Court of Admiralty, this suit was instituted by the present manager of the bank, David Miln, and the widow and executrix of Keil, against Charles Walton and Alexander Gopsell Pooley, for the purpose of establishing a lien on the freight of the ship for payment of the bills rateably. The alleged lien was founded on a letter [*355] of Alexander Gopsell *Pooley (marked C.,) dated the 18th June, 1841, more fully set out in the judgment in this case, by which he directed Walton as his agent to satisfy, out of the freight, any current bills of exchange given by him in payment for the vessel to Henry Castle and James Keil; which letter the defendant Walton had recognized by writing his acceptance thereon.

The bill charged that the defendant Walton pretended that the bill of exchange for £750 was indorsed to him by Castle for valuable consideration, and that the same being dishonored, he, the defendant Walton, claimed and insisted on some prior right to retain out of the freight the amount due on the bill; whereas the plaintiff charged that the defendant was not entitled to any such right, and that he ought to set forth when he received such bill, and particularly whether he received it before or after his acceptance of the letter or order of the 18th June, 1841.

The defendant Walton by his answer stated that he insisted on a lien prior to that of the plaintiffs, by virtue of a letter or order of Alexander Gopsell Pooley (marked E.,) dated the 21st May, 1841, which had ever since been in his the defendant's possession, by which Pooley directed Walton out of the before-mentioned freight to pay Henry Castle £750, on his giving up the bill for that amount. Walton stated that on the 28th June, 1841, Castle requested him to discount the £750 bill, which he accordingly did, relying on the letter or authority of the 21st May. He admitted that a few days previously, viz. on the 21st June, Henry Castle called upon him and brought him the letter or order of that date, and that he accepted it; but he stated that he did so on the representation by Castle that there would be a surplus arising from the freight over and above the £750 secured by the letter of the 21st May, and that he, Castle, had procured

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such further order for the purpose of making the surplus available *for the payment of any residue of the purchase-money which might, on the receipt of the freight, remain unpaid. [356] The defendant further stated that having accepted the last-mentioned order, he returned it to Castle, and kept no copy of it. He admitted that he had been informed in May, 1841, that Keil had a mortgage on one moiety of the vessel, but he denied that before December, 1841, he ever knew or believed that Keil was or had been a part owner, or that he or the company had any interest in the ship, other than by way of mortgage.

The defendant also by his answer suggested that Keil, at the request of Castle, had procured one William Black to discount the bill for £1424 10s., and he submitted that Thomas Pooley, who had recently become the legal owner of half the vessel, and William Black, ought to be parties to the suit.

After the defendant Walton had put in his answer, the plaintiffs amended their bill by simply making Thomas Pooley and Black defendants; taking no notice of the defence set up by Walton.

The case now came on for hearing.

In support of the plaintiffs' case, the evidence of Alexander Gopsell Pooley, after some opposition on the part of the defendants, was read. He stated that, after having contracted to purchase the ship of Castle in May, 1841, upon which occasion he gave the order of the 21st of that month, he discovered Keil to be interested in the ship, whereupon a fresh agreement was entered into between him and Keil and Castle, and he gave the order of the 18th June, 1841. He stated that, when he signed the latter order or authority, he gave it in substitution of the order of the 21st May, and that nothing, as he believed, had been done under the first order when the second was accepted by Walton.

On the part of the defendants, Henry Castle was *examined. His testimony, although not very precise, [357] supported, in the main, the statements of Walton's answer.

It appeared that on the arrival of the barque Elizabeth in Lon-

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don, the defendant Walton took the proper legal steps to compel payment of the freight.

Mr. *Wigram* and Mr. *W. M. James*, for the plaintiffs.

Mr. *J. Tayler*, for the defendants A. G. Pooley Black and Thomas Pooley.

Mr. *Russell* and Mr. *Roundell Palmer*, for the defendant Walton.—There is no allegation in the bill that the plaintiffs had any claim under the memorandum E., or that it ever was in their possession, or that they ever knew of it. No ground, therefore, is laid for the story as to the substitution of one document for the other, nor do the other circumstances of the case bear out that statement. Walton's signing the memorandum C. could not invalidate the prior document. He must be treated as a purchaser for valuable consideration without notice. He expressly denies notice of Keil's interest as a part owner, and, in fact, that title is not set up by the bill.

Mr. *Wigram*, in reply.—It is said that the plaintiffs have not insisted by their bill that the second order was in substitution for the first. It was clearly, however, a revocation of the first. The first order was revocable with the consent of Henry Castle; and it is clear that when the second was given, the first had not been acted upon. The second order embraces all the bills which are the subject of the suit; it is accepted by Walton, with the consent of Castle; it is put out to the world by Walton; and he retains the other in his possession. Under these circumstances, what was there to keep the first order alive? It is [*358] said also that Walton was a purchaser for valuable *consideration without notice. How can that be asserted, when he put his signature to an instrument acknowledging notice that the bills were given in payment of Castle and Keil?

The following cases were mentioned in the course of the ar-

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gument: *Row v. Dawson*,^(a) *Lett v. Morris*,^(b) *Hutchinson v. Heyworth*,^(c) *Walker v. Rostron*.^(d)

June 29th.—THE VICE-CHANCELLOR.—In this case, the plaintiffs, representing a partnership called the Dundee Union Bank Co-partnership, or the Dundee Union Banking Company, seek, by means of a letter or written order, dated the 18th of June, 1841, to establish a lien on money in the hands of the defendant Mr. Walton, for the payment, rateably and equally, of three bills of exchange for the sums respectively of £1424 10s., £700 and £750, of which the two former are held by the Dundee Bank (represented, as I have said, by the plaintiffs,) and the other, namely, that for £750, is held by Mr. Walton himself, who contends that the first and preferable lien on the money is that for his own bill; and that the lien of the Dundee Bank for their two bills is secondary and postponed to his. That is the question to be decided. The money on which these claims are made was received by Walton, as the broker or agent of the ship *Elizabeth*, for freight earned by that vessel, and is what remains clear, after paying the incidental expenses.

Mr. Henry Castle was owner of the whole of the vessel, subject to this—that, of half of her, Mr. Keil was the registered and apparent owner; but it was the understanding and agreement of Castle and Keil and the Dundee Bank, one of whose agents Keil was, that Keil should hold "that moiety only" [*359] as a mortgagee from Castle for the purpose of securing to the Dundee Bank a debt that Castle owed to them. This has never been disputed by any person, and, accordingly, Keil never interfered, nor did the Dundee Bank interfere in the management of the vessel in any manner.

In this state of things, Castle, in the year, 1841, contracted to sell the vessel to Alexander Gopsell Pooley. The three bills that I have mentioned were drawn by Alexander Gopsell Pooley upon Thomas Pooley, and accepted by Thomas Pooley, for part of the purchase-money upon this sale, and, accordingly, the

(a) 1 Ves. sen. 331.

(b) 4 Sim. 607

(c) 9 Ad. & Ell. 375.

(d) 9 M. & W. 411; see *Burn v. Carvalho*, 4 Myl. & C. 690.

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three bills became the property of Castle, subject to such claim as Keil, on behalf of the Dundee Bank, might make.

The purchase having been completed, it was arranged between Castle and Keil, and the Dundee Bank, that Castle should take, and he did take, the £750 bill, and become the holder of it for his own use. The plaintiffs allege, and I assume, that, it having been also agreed that the Dundee Bank should take the other two bills for their use, they did so take and become the holders of those two bills.

The three bills were payable to the order of the drawer, and indorsed by him.

The bill for £700 was dated the 21st May, 1841, and payable six months after date.

The bill for £750 was dated the 26th May, 1841, and payable six months after date.

The other bill was dated the 18th June, 1841, and payable ninety-eight days after date.

Mr. Alexander Gopsell Pooley signed and delivered to Mr. Castle the following document, dated the 21st May, 1841, and addressed to Mr. Walton:—

May, 21, 1841.

“Dear Sir,—I hereby authorize you, as my agent, to charter or freight the barque Elizabeth from Bermuda to [360] *some other port in North America, and back to England, as you may deem for my interest, to retain and deduct out of the freight and passage-money, during the continuance of the present and such future voyage, the sum of £750, and to pay the same to Mr. Henry Castle, on his giving up to you my draft on Mr. Thomas Pooley for that amount.

“A. G. POOLEY.

Walton, having had this document produced to him by Castle, acknowledged it on the same day by writing across it thus:—
“Accepted, May, 21, 1841. Charles Walton.”

The draft mentioned in the paper, which I have read, marked E., is agreed on all hands to be the bill of exchange for £750, dated 26th May.

Another paper, being the exhibit C., was afterwards signed by

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Alexander Gopsell Pooley, and delivered by him to Castle. It is dated 18th June, 1841, and is addressed to Walton, being in these terms:—

“18th June, 1841.

“Sir,—I authorize you to retain, out of the outward and homeward freight of the barque Elizabeth, and out of the insurance money in case of loss, the full amount of the money due to me at any time hereafter, or the full amount of any current bills of exchange given by me in payment for the said vessel to Mr. Henry Castle and Mr. James Keil, and to pay such amount, receivable from freight or insurance, to Mr. Henry Castle and Mr. James Keil, on their giving up to you, or reducing in proportion, the securities held by them.

“A. G. POOLEY.”

On the 21st of the same month of June, Walton having had this document produced to him by Castle on that day, acknowledged it by writing across it thus: “Accepted, June 21, 1841, Charles Walton.”

After the 21st of June, Walton relying, as he says, on *the order or letter of 21st May, discounted the bill of [*361] £750 for Castle, and so became the holder of it for value, and the question, as I have said, is, whether the bill is entitled to priority. The order or letter giving the lien for it having been received and accepted by Walton before the existence of the order or letter under which the plaintiffs claim, there is plainly *prima facie* a title in Walton to priority of security for the £750. It has been, however, argued that the later of the two orders or letters was a substitute for the earlier, or that the earlier ceased by reason of the later.—There is certainly no apparent inconsistency between the two documents; nothing on the face of them contrary to the notion of their being simultaneously in force. It is true that the former may be said to cover part of what is covered by the latter. But assuming this to be so, and the latter is not operative for so much as the former covers, still the document of June may contain matter of superfluity or confirmation without involving the destruction of the document of May. Does a creditor, having a mortgage on the funds of his

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debtor for part of his debt, necessarily surrender that mortgage or lower its priority by taking a subsequent mortgage on the same funds for the whole of the debt? If there be no more in the transaction, I apprehend that the earlier mortgage remains in force and maintains its rank notwithstanding the other, and may be dealt with by the creditor separately. Or if A., a creditor, having security for his debt upon the funds of the debtor, take afterwards, either alone, but on behalf of himself and B., another creditor of the same debtor, or jointly with B., a security for both debts on the same funds which were the subject of A's separate security, does A., by doing so, necessarily relinquish the separate security or alter its precedence? If there be no more in the transaction, I apprehend not. It is said, [*362] however, that there was an actual contract "proved by Mr. Alexander Gopsell Pooley, or otherwise, by which the document of June was to be preferred to the document of May, or to be in substitution for it; and it may be that the evidence of Mr. Alexander Gopsell Pooley ought to be read, as going to that extent.

Considering, however, the nature of each of the documents, considering that the exhibit E. is in existence in the possession of Walton, considering the whole of the evidence in the cause taken together (though I am aware that the testimony of Henry Castle is not free from error or inaccuracy),—and considering the statements in Walton's answer in connection with the frame of the bill, amended as it was after that answer had been filed, I am unable to arrive at the conclusion that any such contract of preference was entered into, or that any such substitution was contracted for, or meant to take place, or did take place. It appears to me that the document marked E. continued in force after and notwithstanding the document marked C. It appears to me, whether Castle was or was not absolute master of both documents and all the bills when Walton discounted the bill for £750, that Walton having notice of both documents had a right to consider and trust to the document marked E. as giving a first lien on the freight for that bill, that he must be taken to have discounted it on that faith, and that his lien must rank accordingly: the plaintiffs having, in my opinion, failed to establish

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that Walton, at the time of discounting, had notice of the existence of any circumstance giving the Dundee Bank any title to priority or equality, if indeed any such circumstance existed, and there being no case of misrepresentation or suppression or fraud proved or even alleged against Walton. The bill is indeed, wholly silent as to the document marked E., though Walton by his answer, most pointedly insists upon it, and possibly might not have enabled the Court to give effect to any contract of preference or *substitution, if any had been proved. [*363] As, however, none has, in my view, been proved, that point is not material.

DECLARE that the defendant Walton, as the holder of the bill for £750, is entitled to a first and preferable lien for the payment of that bill on the freight in the pleadings mentioned, after paying all charges and expenses properly payable out of it. At the request of the plaintiffs, take an account of what has been received by Mr. Walton, or by his order, or for his use, in respect of the freight in the pleadings mentioned, and in respect of the charges and deductions to which the same is properly subject. Take an account of what is due in respect of the bill for £750, and interest. Reserve further directions and costs.

LONGMORE V. ELCUM.

1843: June 13th.

Testator gave, devised and bequeathed to his executors all his freehold and leasehold estates, annuities, monies out upon security to interest, and every of them, upon trust to permit his wife M. to receive the rents, issues, income, profits, and proceeds thereof for her own use and benefit, and for the maintenance and education of his children, naming them, so long as his said wife should continue his widow; and in case she should marry, to pay her an annuity of £100 per annum; and subject to such trusts, in trust, after the decease or marriage of M., for his said children in equal shares, when and as they should attain the age of twenty-one—*Held*, that a trust was constituted of a sufficient part of the income of the property for the maintenance and education of the children, and that such trust was capable of continuance beyond the period of a son attaining twenty-one, or a daughter attaining that age, or marrying. The Court, however, being of opinion that a discretionary power as to the mode of executing the trust was given to M., directed inquiries for the purpose of ascertaining how such discretionary power had been and how it ought to be exercised.[1]

[1] See the case of *Thorp v. Owen*, 2 Hare, 607; *Sheppard v. Wilson*, 4 Hare, 399, and note; *Campbell v. Campbell*, 7 Beav. 482.

1843.—Longmore v. Elcum.

JOHN ELCUM being entitled to freehold and leasehold estates, and personally to a considerable amount, made his will in these terms:—"I do order and direct that my just debts, funeral and testamentary expenses, shall be fully paid and satisfied. I give and bequeath unto my dear wife Maria Elcum, all my household furniture, books, stock in trade, plate, linen, china, and wearing apparel, absolute for her own use and benefit. I give, devise, and bequeath unto my executors hereinafter appointed, all my freehold and leasehold estates, annuities, monies out upon security at interest, and every of them, to hold the same unto my said executors and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, according to the nature of the said estates and prop-
[*364] erty, respectively, *upon the trusts hereinafter mentioned, that is to say, upon trust to permit and suffer my said dear wife Maria Elcum to receive, take and retain the rents, issues, income, profits, and proceeds thereof for her own use and benefit, and for the maintenance and education of my dear children, Maria Elcum, Stephen John Elcum, Margaret Elcum, Hugh William Elcum, and Charles Frederick Elcum, so long as she my said wife shall continue my widow and unmarried; and from and after the marriage of my said dear wife, in case she shall think proper to marry, then upon trust that they my said executors or the survivor of them, his executors, administrators or assigns, do and shall receive and take the income and proceeds of the said trust estates and premises and thereout pay unto my said dear wife for and during the term of her natural life one annuity or yearly sum of £100 of lawful money, by equal quarterly portions, for her sole and separate use, independent of such husband, and not subject to his debts, control or engagements nor the payments thereof to be in any manner charged by anticipation, and her receipt alone to be a discharge for the same; and, subject to the trusts hereinbefore declared, in trust from and after the decease or marriage of my said dear wife Maria Elcum, for my said dear children, Maria Elcum, Stephen John Elcum, Margaret Elcum, Hugh William Elcum, and Charles Frederick Elcum in equal proportions, share and share alike, when and as they shall attain their respective ages

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of twenty-one years, with full power for my said executors to apply the part or share of any one or more of my said children towards the maintenance, support education, and advancement in life of such child or children from whose part or share such money shall be by them advanced; and in case any one or more of my said dear children shall happen to die under the age of twenty-one years, then the part or share or proportion of him, her or them so dying, or so much thereof as shall not have been applied towards his, her or their *advancement [*365] in life shall belong to, and be the property of, the survivor or survivors of them, on his, her or their attaining the age of twenty-one years." The testator then gave and bequeathed all the residue of his estate and effects of what nature or kind soever to his wife for her own use and benefit, and appointed Thomas Longmore and Michael Taylor, together with his wife, so long as she should continue his widow, executors of his will; and he declared that it should be lawful for his executors to apply any money which might come to their hands by reason of any of his said several annuities being re-purchased, or otherwise in pursuance of his will, in the purchase of any other annuities or property whatsoever which his wife might direct, (which direction when given be thereby declared to be a full and sufficient authority and indemnity for them in making such purchase or purchases) and that the estate, annuities and property so purchased should be subject in all respects to the trusts of his will. The will then contained the usual clauses as to the receipts of the trustees being sufficient discharges, and for the indemnity and reimbursement of the trustees.

By a codicil, the testator gave power to his executors, with the consent of his wife, to make leases of any dwelling-house and premises in the London Road, Southwark, to any person or persons, for any term of years which they might think fit, so as that a less rent were not reserved than £70 per annum; and that, subject to such rent, his executors might take for such lease or leases, and the good-will of his business, such fine or premium as they might be able to obtain; and that such money as should arise by the means aforesaid, should by them be laid out and expended in the same manner as the money which

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might come to the hands of his executors from the repurchase of any or either of the annuities mentioned in his will.

The testator made a second codicil to his will in these [366] terms —“Whereas by my will, I have bequeathed to *my son Stephen John Elcum, a fifth part of my leasehold estates and annuities, after the decease of my wife Maria Elcum : And whereas it may happen that my son Stephen John Elcum may attain the age of twenty-one years, and be in want of money to commence his studies as a surgeon, before his part or share of the said trust-premises shall be payable or assignable to him ; now therefore I do order and direct, that my executors appointed by my said will, do and shall, out of any money which shall come to their hands by virtue of my said will, advance to my said son the sum of £200, on his attaining the age of twenty-one years ; such money to be considered as a part payment of his share or interest in the said hereinbefore mentioned trust-premises.”

The testator died in June, 1814, leaving his widow and the five children named in his will surviving him, who were at that time all infants. In July, 1814, the will was proved by the executors and executrix. The executors, however, never acted in the trusts of the will except in signing a lease. The whole of the property, both real and personal, was possessed by the executrix ; who, as the bill alleged, “long since paid and satisfied all the testator’s debts and funeral and testamentary expenses, and the said legacy of £200, there remaining in her hands after such payment a very large sum of money, which arose from the testator’s personal estate.”

In July, 1815, Maria Elcum, the testator’s daughter, married Longmore, one of the executors. Some years afterwards, Margaret married Phillip Rees. In 1828, Stephen John, the testator’s eldest son and heir-at-law, died intestate and unmarried, having attained the age of twenty-one ; whereupon letters of administration of his personal estate were granted to his sister, Mrs. Longmore.

In 1839, Longmore wrote a letter to the widow, calling upon her to make some provision for his wife, observing amongst [367] other things, that the income of the residue under *Mr.

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Elcum's will was made a trust in her hands, not merely for her own exclusive use, but for the maintenance and education of her children; and that a direction for maintenance and education, when applied to a testator's child was not confined to infancy or inability on the part of the child, but that the child was entitled to a reasonable provision, notwithstanding the expiration of the period of infancy, or marriage.

No attention being paid to this letter, the present bill was filed by Longmore against the widow, the co-executor, and the surviving children of the testator, (including Mrs. Longmore) praying that all proper accounts might be taken of the rents, profits, interest, and dividends of the testator's real and personal estate; and that the rights of the several parties interested therein might be ascertained and declared, and the fund secured for their benefit. The bill also, notwithstanding the allegation before referred to, prayed for accounts of the testator's debts funeral and testamentary expenses and legacies, and that the personal estate might be applied in a due course of administration.

Mr. Russell and Mr. Bilton, for the plaintiff, contended that the will created a trust of the income for the benefit of the widow and for the maintenance of the children, so long as the widow remained unmarried; that the children took as joint tenants with the widow, and that the circumstance of two of the children being married women would not affect their right to a provision for maintenance. *Macpherson on Infants*, 315, *Kilvington v. Gray*, (a) *Foley v. Parry*, (b) *Soames v. Martin*, (c) *Hadow v. Hadow*, (d) *Jubber v. Jubber*, (e) *Raikes v. Ward*, (f) *Crockett v. Crockett*, (g) **Pride v. Fooks*. (h) [The Vice-Chancellor referred to *Woods v. Woods*. (i)] [*368]

Mr. Southgate, for the defendant Mrs. Longmore.—It is clear that there is a trust for "the use and benefit" of the widow. If so, there is also a trust for the "maintenance and education" of

(a) 10 Sim. 293.

(b) 5 Sim. 138; 2 Myl. & K. 138.

(c) 10 Sim. 287.

(d) 9 Sim. 438.

(e) Id. 503.

(f) 1 Hare, 445.

(g) Id. 451.

(h) 2 Beav. 430.

(i) 1 Myl. & Cr. 401.

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the children. You cannot reject the latter words. The question therefore is, whether the trust for Mrs. Longmore does not continue after her attaining majority, and after her marriage. *Badham v. Mee*.(a)

Mr. *Wigram* and Mr. *Elmsley*, for the defendant Mrs. Elcum.—The plaintiff marries the testator's daughter in 1815, and in 1839 he applies to the widow to give something for the maintenance of his wife. Is the widow not only to provide future maintenance, but to account for the past? It is said that this is a trust for the children. In none of the cases where the word "maintenance," or the words "maintenance and education," have occurred alone, has a trust been held to be created. The word "maintenance," coupled with the words "support" and "benefit," has been held to raise a trust,(b) on the ground that the object of the testator would otherwise be frustrated by the parent's insolvency; but in those cases the court has gone a great length. The case of *Badham v. Mee* did not raise the question, whether a gift to A. for the maintenance of her children constituted a trust, but whether, there being a clear and distinct trust for the children, it should be continued beyond their majority, until the period of the distribution of the fund. *M'Dermott v. Kealy*(c) was to the same effect. Here we submit that the words are not sufficient to create a trust for the children.

But supposing a trust of the income to have been created, [369] still the widow has a clear discretionary right as to the mode of applying it. Suppose the income to be of such an amount as not to allow of more than one establishment: is every married woman to take something from the general fund, so as to drive the widow into lodgings? Admitting that the daughter is entitled to some part of the income, she must come into the family to receive it: she cannot take it with her into other quarters. There is a sort of survivorship for those who are still at home. That the testator contemplated a home for the children, is manifest from the second codicil.

(a) 1 Rnm. & M. 631.

(b) See *Wetherell v. Wilson*, 1 Keen, 60.

(c) 3 Rnm. 264, n.

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Mr. *Bilton* in reply.

THE VICE-CHANCELLOR, after directing the bill to be dismissed with costs, so far as it sought accounts of the debts, funeral and testamentary expenses, and general legacies of the testator, and reserving the taxation of those costs, proceeded as follows: With regard to the only remaining subject of dispute, namely, the bequest of certain specific things which the testator gives in such a manner as to raise the question whether a trust is created for the benefit of the children, I think it clear that it is; and if any thing beyond the words of the bequest itself could be required to lead to that conclusion, it is afforded by this: that, in speaking of the income of the specific fund, he directs it to be paid to his wife, Maria Elcum, "for her own use and benefit, and for the maintenance and education of his children;" but when he gives the residue, he gives it to Maria Elcum, "for her own use and benefit," stopping there. Not, however, relying on that circumstance alone, it is clear, upon the authorities, that a trust was created for the children.

The next question is, what is the extent of the trust—whether it is limited by any particular age or state in life of the persons who are to take under it? The income is *given [*370] to the wife for her use and benefit, and for the maintenance and education of the children, "so long as she shall continue my widow." According, therefore, to the ordinary use of language, the words "so long as she shall continue my widow" apply as much to the maintenance and education of the children, as to the use and benefit of the widow. The income therefore, is given for those purposes "so long;" and then if she marries, an annuity of £100 is given for her separate use. Then "from and after the decease or marriage" of the wife, the testator disposes of the property amongst the children. Now, those words lead to the inference that the testator considered that he had disposed of the income accruing before the decease or marriage of his wife. Taking it, therefore, that he thought so, one of the objects which he has expressly mentioned for the employment of that income during that time is the maintenance and education of the children. I am of opinion that a daughter

 1843.—Longmore v. Elcum.

marrying or attaining her majority, or a son attaining his majority, would not thereby of necessity lose any title to participate in this income.

The next question is, though the benefit may not have ceased with any particular age, whether the nature of the trust is such as to exclude any discretion in the widow as to the distribution of the income; whether it is necessary that there should be an equal distribution; whether any child is entitled capriciously to break up the family, and, settling herself elsewhere, take her proportion of the income, and leave the widow with diminished means, or no means, of maintaining the respectability of the family, and providing a home for herself and the other children. It seems to have been an object with the testator, to prolong as much as possible, after his death, the union of his family—and it is the duty of the Court, as far as it can, to give effect to an endeavour so natural, so just, and so laudable. I am not at present, however, disposed to decide that this is a mere ordinary joint tenancy for the benefit of these persons, but to hold that there is a discretion in the widow as to the disposition of the income of the fund. Upon that point, however, I shall reserve my opinion until I shall have obtained information which in every respect may be useful. Therefore—

REFER it to the Master to inquire of what particulars the real estate devised, and the personal estate specifically bequeathed, by the testator, under the terms “all my freehold and leasehold estates, annuities, monies out upon security at interest, and every of them,” consisted at the time of his death; and whether any and which of the leases have expired or been determined or renewed; and whether any and which of the annuities have been repurchased or compounded for, and how, and in what manner; and what sums have been received in respect of such purchase and compounding, and by whom, and what has been done with them; and whether, as to the money out upon security, there has been any change or re-investment; and what is the state of the capital affected by the specific bequest; and what was the clear income produced by the said real and personal property, after all deductions, at the time of the testator’s death; and what is now the clear income produced by the said real and personal property after all deductions; and what, upon an average, has been the annual clear amount of such income, so far as the Master shall be able to state the same, from time to time, since the testator’s death; and whether the defendant, Mrs. Elcum, has made any and what accumulations or investments of or by means of the same. The Master to be at liberty to state any special circumstances with regard to the manner in which Mrs. Elcum and her children have lived and been maintained since the testator’s death, and as to her conduct towards them in respect of her income under the

 1843.—Longmore v. Eleum.

will, and as to the acquiescence of any person or persons. Inquire whether any and what leases have been granted of any and what part of the leasehold estate, and whether any and what fines have been paid in respect of them.

See the next case.

*WILSON v. MADDISON.

[*372]

1843: June 27th.

Upon the construction of a will:—*Held*, first, that a bequest of £30 a year, from “the interest of the testator’s funded money in the Bank of England,” did not amount to a bequest of so much stock as would produce that annual sum, but constituted an annual charge of £30 upon the funded property for the life of the legatee. Secondly, that a bequest of £30 a year to A., together with her children B., C., and D., and for their joint maintenance, was a bequest of that annual sum to the mother and her children, as joint tenants, for the life of the longest liver of them.[1]

Where a testator puts himself in *loco parentis* of the legatee, the legacy will bear interest at £4 per cent. from the death of the testator.

THE will of William Kelly was partly in these terms:—As for such wordly estate and effects which I shall be possessed of or entitled unto at the time of my decease, I give and bequeath the same as followeth; that is to say, I give and bequeath unto my daughter, Eleanor Gold Kelly, my cottage-house at Shirley, Southampton, and premises adjoining the same. I also give and bequeath to Ann Wilson, otherwise Ann Wood, of East Grinstead, together with her little girl Louisa, and two little boys, Frederick and Octavius, my adopted children, and for their joint maintenance—their mother, Ann Wilson otherwise Ann Wood, to have the care of bringing them up to the best of her power till they are able to do for themselves—£30 a year, from the interest of my funded money in the Bank of England, to be paid to the said mother as above, half-yearly, or as may best suit, as her conduct deserves, &c. [Then followed some pecuniary and specific legacies.] I also give and bequeath £100 to each of the

[1] See *Morton v. Tewart*, ante, 81, and note; *Bustard v. Saunders*, 7 Beav. 92.

1843.—Wilson v. Maddison.

before mentioned three children, towards their education and instruction. I also give and bequeath to Ann Wilson, otherwise Ann Wood, £10 for clothes, to be paid early as can be, &c. I also leave and bequeath £100 lawful money in England, for my burial expenses, &c. I do hereby nominate, constitute, and appoint Martin Maddison, jun., Esq., of Southampton, banker, and Charles Davies, Esq., solicitor, also of Southampton, executors, of this my last will, making void all former and other wills. I give and bequeath to each of the above-named executors £15 current money in England.

The testator made a codicil, bearing even date with his will in these terms:—"Item, the money in the funds standing in my name I leave in trust for them to pay the interest as it [*373] becomes due to my daughter, Eleanor Gold *Kelly, and her receipt alone to be their discharge, and to be independent of any husband she may have, to be for her sole use and benefit, and not to be liable for any debts her husband may contract; at her decease, the trust to pay the interest to her husband, so long as he remains single; and the said trust to hold the same for him independent of his debts. Should he marry again, then the trust to hold the same for the children of the marriage with my daughter, E. G. Kelly, and the principal to be paid them in equal proportions, upon their attaining twenty-one years, with any interest that may be due; the interest during their minority to be applied to their education so long as they remain at school. The house at Shirley I leave upon the trust, and in like manner for my daughter E. G. Kelly; but on her death, and the eldest son coming of age, to be for his use and benefit; and if no son, then the eldest daughter; the rent to be applied in the same way as the interest in the fund: should there be no children, then the whole property to be at my daughter, E. G. Kelly's, disposal."

The bill, which was filed by Ann Wilson and her children against the executors and the residuary legatee, prayed an account and payment of what was due in respect of the annuity and the legacies given to the children, and that a sufficient part of the testator's funded property, or of his other personal estate, might be set apart and appropriated for payment of the annuity,

 1843.—Wilson v. Maddison.

and that the rights of all parties in the annuity and in the capital sum so to be appropriated might be ascertained and declared.

Mr. *Russell* and Mr. *Robson*, for the plaintiffs.—The bequest to the mother and children is an absolute bequest of so much stock as will produce an annuity of £30; *Stretch v. Watkins*,^(a) *Tweedale v. Tweedale*; ^(b) and though in **Blewitt v. Roberts*,^(c) Lord *Cottenham* held, that a simple gift of annuity to A. does not give an annuity beyond the life of A., yet he said that it was not inconsistent with this to hold, that a gift of the produce of a fund, without limit as to time, gives the fund itself. In the former case, his Lordship added, there was no allusion to any principal sum. Now, in the present case there is such an allusion; for a bequest of so much a year from the interest of "my funded money in the Bank of England" is equivalent to a bequest of so much of "my funded property" as will produce that annual sum.

Supposing, however, the plaintiffs not to be entitled to this extent, they are at least entitled to an annuity of £30 for their joint lives, and the life of the survivor of them, and a fund must be set apart to answer the annuity. The words "joint maintenance" apply to the mother as well as the children: *Soames v. Martin*,^(d) *Kilvington v. Gray*.^(e) With respect to the legacies of £100 to the children, the testator having placed himself *in loco parentis*, interest on them must be calculated at £4 per cent. from the death of the testator: *Beckford v. Tobin*.^(f)

Mr. *Stedman*, for the defendants, the executors.

Mr. *Hubback*, for the defendant Eleanor Gold Kelly, was upon the first point, stopped by the Court.—Then, secondly, the words "joint maintenance" apply to the children only. The mother was not intended to take any beneficial interest. That construc-

^(a) 1 Madd. 253.

^(b) 10 Sim. 453.

^(c) Cr. & Ph. 274; see p. 282.

^(d) 10 Sim. 278.

^(e) Id. 293; see *Longmore v. Elcum*, ante, p. 363.

^(f) 1 Vez. sen. 310.

 1843.—Wilson v. Maddison.

tion must prevail which exhausts the words of the testator. Taking the whole will together, it is clear that the testator had in his mind a provision for the children during their infancy only: *Badham v. Mee*, (a) £30 a year would be totally insufficient for them for the remainder of their lives. In *Miller v. Woodward*, (b) which was the case of an agreement, the *Master of the Rolls* was disinclined to extend the period of payment of an annuity beyond that which the terms of the agreement absolutely warranted.

THE VICE-CHANCELLOR.—I do not at all dispute that, generally, an unlimited bequest of the income of stock is to be construed as an absolute gift of the stock itself. I cannot, however, read the bequest in this will as importing so much. What the testator gives is an annuity of £30 a year charged upon the stock: not an annuity of £30 a year, part of the stock. A life annuity may be charged upon stock as well as any other property. This construction, if it required any support, derives support from the codicil, which is not contended to have revoked the bequest in the will. The codicil treats the property as to be enjoyed by the daughter, charged with the annuity.

With respect to the language of the will, there is probably some degree of inaccuracy in it, as it was drawn by the testator himself, but, upon the whole, it is sufficiently plain. The effect of it is to give an annuity of £30 to four persons, for their joint lives and the life of the survivor; with a direction, that, while three are minors, the fourth, being an adult, shall receive it for their maintenance.

DECLARE, that the plaintiffs are entitled to an annuity of £30 a year during their joint lives, and the lives and life of the survivors and survivor, to be enjoyed by such of them as are living, for the time being, equally, and to be secured upon the funded property. Declare, that the legacies of £100 bear interest at £4 per cent. from the death of the testator. * * * * Transfer £1000 £3 per cent. annuities into the name of the Accountant-General to an account entitled the Annuity Account; and out of the dividends thereof let the Accountant-General pay to Mrs. Wilson, until further order, for the joint benefit of herself and the other plaintiffs, the sum of £15 half-yearly. * * * *

 (a) 1 Russ. & M. 631.

(b) 2 Beav. 271.

 1843.—*Silcock v. Roynon*.

*SILCOCK V. ROYNON.

[*376]

1843: June 22nd.

The defendants in a foreclosure suit, properly disclaiming, are entitled to their costs [1]

BENJAMIN ROYNON, being seized in fee of a freehold estate, subject to a term of 1000 years vested in the plaintiffs by way of mortgage for securing £75, by his will, dated 30th August, 1823, devised his estate to his son Benjamin for life, and after his decease equally amongst the children of his said son, as tenants in common; and, if he should not have any children, unto his (the testator's) children, John Roynon and Fortune Atkins, wife of Joseph Atkins, and their heirs, as tenants in common.

The testator died soon after making his will.

The bill was filed against Benjamin Roynon, the son, John Roynon, and Joseph Atkins and his wife, praying for a foreclosure of the premises.

Up to the filing of the bill, in October, 1842, Benjamin Roynon, the son, had no issue.

The defendants, John Roynon, and Joseph Atkins and his wife, put in a joint answer and disclaimer, whereby they alleged that they did not claim, and never had claimed, any interest in the mortgaged premises, and that no application to them to disclaim had been made before the filing of the bill.

The cause was heard on bill and answer.

Mr. *Freeling*, for the plaintiffs, submitted that the disclaiming defendants were not entitled to their costs: *Tipping v. Power*.(a)

Mr. *Hislop Clarke*, for the defendant John Roynon.

(a) 1 Hare, 405.

[1] *Calkin v. Harned and others*, 3 Johns. Ch. R. 61. Where a mortgagee brought a bill to foreclose, and subsequent incumbrancers answered and disclaimed as to him, held, that they were entitled to the costs of their answer out of the fund, though as between themselves they contested the right to the surplus. *Mackie v. Cairns*, 5 Cowan R. 547, 563.

 1843.—*Silcock v. Roynon*.

Mr. *Piggott*, for the defendants Atkins and wife.

THE VICE-CHANCELLOR.—The case cited was not a foreclosure suit, which this is. I apprehend that it has [377] been the course of the Court, in a foreclosure suit, to give the defendants, properly disclaiming, their costs, and generally to add them to the plaintiff's debt. Here the defendants have used proper words of disclaimer. The bill must be dismissed as against John Roynon, and he is entitled to his costs. I cannot, however, let the husband and wife be dismissed.

REFER it to the Master to inquire whether the defendant Benjamin Roynon has ever had any, and what, issue; and if the Master shall find that there has never been any such issue, then take the usual decree for foreclosure. Dismiss the bill as against John Roynon with costs, to be paid by the plaintiffs and added to their debt. The plaintiffs to pay the costs of Atkins and wife, and to add them to their debt; but the consideration, how such costs are to be ultimately borne, is reserved, in case Atkins and wife, or either of them, appear in the Master's Office.

BUGDEN V. BIGNOLD.

1843: June 14th, 21st, 26th and 29th.

A, being seised in fee of a freehold and copyhold estate, borrows various sums of money of B., amounting in the whole to £4000, upon mortgage of the freehold estate alone. A. afterwards, in 1832, borrows £500 more of B., on the security of both the freehold and copyhold estate. This mortgage is effected by distinct instruments relating to each property respectively, neither of them referring to the other. In 1833, A. borrows a sum of £400 of C., on mortgage of the freehold estate alone, subject to B.'s incumbrances thereon. Again, in 1838, A., being indebted to D. in £600, executes to him a mortgage for that sum of the copyhold estate alone, without notice of the £500 incumbrance. In 1837, B. has notice of C.'s security, and in 1838, (after having sold both the estates, under powers of sale, and received the purchase-money,) he has notice of D.'s security. The produce of the freehold estate being insufficient to pay B. and C. in full, but that of the freehold and copyhold being sufficient for that purpose, C. claims to have the whole of the £500 charge thrown upon the produce of the copyhold estate, in order that he may receive payment out of that of the freehold; on the other hand, D. claims to be paid the whole of his debt out of the produce of the copyhold estate, in priority to C.;—*Held*, that the claim of neither party can prevail to the fullest extent; but that the

1843.—Bugden v. Bignold.

£500 being by the security of 1832 charged on the freehold and copyhold estates, rateably, (that is to say, in proportion to their respective net values) and without preference, C. has an equity, of the nature claimed by him, to the extent of that proportion of the £500 which is charged upon the copyhold estate, while, in other respects, in relation to that estate, D. has priority over C.

The court-rolls of a manor are not constructive notice of prior incumbrances to a purchaser of copyholds holden of the manor.

IN and previously to the month of October, 1830, Charles Milbank was seized in right of his wife (who was devisee in fee thereof under the will of her father, John Revett) of a certain freehold estate called the East Poole Marsh farm, situate in the parish of Great Stainbridge in the county of Essex, subject to a mortgage for a term of one thousand *years ves- [*378]ted in Sir John Thorold for securing £1500 and interest, which mortgage was originally created by an indenture dated the 27th December, 1796. Milbank was at the same time entitled to the equity of redemption in fee of a copyhold estate holden of the manner of Finginhoe, in the county of Essex; that estate being mortgaged for £1500 to Benjamin Gilson, to whom, as such mortgagee, the premises had been surrendered; the legal estate, however, being in one Bawtree.

In October, 1830, Milbank, through the medium of the defendant Bignold, who was secretary of the Norwich Union Society for the assurance of lives and survivorships, borrowed of that society £1500: and thereupon, by indentures of lease and release dated the 3rd and 4th October, 1830, and made between Milbank and his wife of the one part, and Bignold of the other part, the East Poole Marsh farm was conveyed to Bignold and his heirs, by way of mortgage, for securing the £1500 so borrowed. By the deed of release, a power of sale of the mortgaged premises was given to the mortgagee.

The Norwich Union Society having at the time of this transaction paid off Sir John Thorold's mortgage, an indenture of assignment bearing even date with the release of the 4th October, 1830, was executed, whereby, in consideration of £1500 expressed to be paid to Thorold by the society, the freehold premises were assigned for the residue of the term of one thousand years to Patteson as a trustee for the society.

1843.—Bugden v. Bignold.

In December, 1830, a further sum of £1000 was borrowed by Milbank of the society; and thereupon Milbank and his wife executed to Bignold a deed of a further charge of the freehold premises, dated the 24th December, 1830, endorsed on the indenture of release of the 4th October, 1830, for securing as well that sum as the sum of £1500, which had been previously borrowed of the society.

In April, 1832, a further sum of £500 was borrowed by Milbank of the society, and thereupon another deed of [*379] *further charge of the freehold premises, dated the 23rd April, 1832, endorsed in the same manner as the previous deed, was executed between the same parties, for securing as well that sum as the sums previously secured.

As a further security for the repayment of the last-mentioned sum of £500, Milbank executed to Bignold an indenture bearing even date with the preceding, whereby, after reciting the before-mentioned surrender to Gilson to secure £1500, and that Milbank had applied to Bignold to lend him the sum of £500 &c., it was witnessed, that, in consideration of £500 expressed to have been paid by Bignold to Milbank, Milbank covenanted to surrender to Bignold, by way of mortgage, the copyhold estate, subject to Gilson's security. This indenture contained a power of sale. A conditional surrender of even date was duly made in pursuance of it.

In April, 1833, Milbank borrowed of Round & Co., bankers, of Colchester, a sum of £400; and by an indenture dated the 13th of that month, and made between Milbank and wife of the one part, and Round & Co. of the other part, reciting that the East Pool Marsh farm was charged, by way of mortgage to Bignold, with the principal sum of £4500 and interest, it was witnessed, that, in consideration of £400 paid to Milbank by Round & Co., Milbank and wife did thereby direct and appoint that the said farm with its appurtenances should thenceforth stand charged with the payment of the said sum of £400 and interest, subject to Bignold's securities.

In 1837, the Norwich Union Society first had notice of Round's security.

In March, 1838, the Norwich Union Society paid off Gilson,

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and by an indenture dated the 6th of that month, took an assignment of his incumbrance, with a covenant to surrender the copyhold premises. The copyholds were afterwards, in February, 1840, surrendered to certain persons as trustees for the society.

In July, 1838, there being a large arrear of interest due *to the society on their mortgage securities, the East [380] Poole Marsh farm was by their direction and by virtue of their power of sale, put up for sale by auction, when it was purchased by Stephen Allen for £5000. This purchase was completed in November, 1840.

In September, 1838, Milbank, being indebted to the plaintiff in £600, agreed to execute to him a mortgage of the copyhold estate to secure the repayment of that sum. Accordingly by an indenture dated the 25th of that month, reciting that Milbank was seized in fee of the copyhold premises "subject to a certain conditional surrender made on or about the day of , 183 , whereby the said hereditaments were assured to the said Samuel Bignold, his heirs and assigns," for securing to him, his heirs and assigns, the repayment of £1500 and interest, theretofore advanced by him in discharge of a debt due to Benjamin Gilson on the security of the said premises, and reciting the debt due to the plaintiff, Milbank covenanted to surrender the premises to the plaintiff and his heirs, subject to a proviso for redemption of the premises on payment by Milbank to the plaintiff, his executors &c., of £600 and interest as therein mentioned.

On the day of the date of this indenture the copyhold estate was surrendered to the plaintiff pursuant to the covenant. It did not appear that the plaintiff had notice at that time of the charge of the Norwich Union Society on the copyhold estate under the security of the 23rd April, 1832.

In December, 1838, Round & Co. having ascertained that, after payment of the mortgages due to the Norwich Union Society, with arrears of interest and costs, the proceeds of the sale of the East Poole Marsh farm estate would not be sufficient to satisfy them their mortgage, required the society to resort to the copyhold estate in satisfaction of so much of their mortgage debts as was charged on that estate, in order to enable them, Round & Co., to make their security available. Some discussion

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[*381] then ensued *between the parties as to the legality of this claim of Round & Co. Legal advice, however, being obtained in their favor, the copyhold estate was put up to sale by the society, and was, on the 23rd July, 1839, sold to Firmin for £2000.

It did not appear whether, at this time, either Round & Co. or the Norwich Union Society had notice of the plaintiff's security; but, on the 5th August, 1840, the plaintiff caused a written notice of that security, with a request to account, to be served upon the defendant Bignold.

Milbank afterwards took the benefit of the Insolvent Debtor's Act, and W. S. Cooper was appointed assignee of his estate and effects.

The bill, filed in September, 1840, against Bignold, Cooper, and Round & Co., prayed an account of what was due to the plaintiff on his security, an account of the receipts and payments of Bignold, and of what was due to him in respect of his securities, and that the plaintiff might be declared to be entitled to any balance of monies received, or which might have been received, by Bignold after payment of what might be due to him, in satisfaction, so far as the same would extend, of what might be found due to the plaintiff; and that all other necessary accounts might be taken, and that Bignold might be decreed to pay the plaintiff's costs of the suit.

The defendants, Round & Co., by their answer, denied the claim of the plaintiff, insisting that they were entitled, in preference to the plaintiff, to be paid, out of the proceeds of the copyhold estate, so much of their debt as the proceeds of the freehold estates were insufficient to pay.

Mr. *Wigram* and Mr. *R. W. E. Forster*, for the plaintiff.

—The principles of *Barnes v. Racster*(a) are applicable to [*382] the present case. Applying the language of your Honor in that case to the facts here, when the plaintiff

(a) *Ante*, vol. 1, p. 401. There is an error in the second marginal note of this case, which the reader will readily correct; and in page 409, line 10, *delete* the word "if."

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took his security from Milbank, Round had not acquired any equity against Milbank to preclude him from making the most he could of the copyhold security for his own purposes. It is not indeed clear that there is any equity of marshalling before a suit is instituted; therefore, as the plaintiff took his security before any suit instituted, it would seem that the utmost Round could do at that time, putting aside the express contracts of the parties, would be no stand *pari passu* with the plaintiff on the copyhold estate. But here the plaintiff has a direct security on the copyhold estate, by express contract. On the other hand, the defendants could only reach that estate by means of a mere personal equity against the mortgagor, which cannot be enforced against a *bona fide* incumbrancer for value, without notice. *Averall v. Wade*,^(a) *Aldrich v. Cooper*.^(b) If the defendants can show that the equity which they claim fixes on the land, then undoubtedly the plaintiffs must take subject to their equity. But if they rely merely on the personal equity of marshalling, they can take nothing but the surplus proceeds of the estate after satisfaction of the plaintiff's security. No notice which the defendants could have given could have prevented the plaintiff from dealing with the copyhold estate. It appears, indeed, that, in 1837, they did give notice to Bignold of their security. But such notice to the holder of the legal estate, in cases affecting real property is wholly inoperative: *Jones v. Jones*,^(c) *Peacock v. Burt*.^(d)

Mr. *Russell* and Mr. *Bacon*, for the defendants Round & Co.—These defendants resist *in toto* the plaintiff's claim. They, on the other hand, claim to have the whole of "the [*383] proceeds of the copyhold applied in their favor, to make up the deficiency of the proceeds of the freehold. The doctrine of notice will not, it is conceived, affect the rights of the parties; but so far as it may be material, the plaintiff must be held to have had notice of every thing. The recital in his deed of the surrender to Bignold contains matter which ought to have put him upon inquiry as to the nature of Bignold's security. The

(a) Rep. t. Supp. 252.

(c) 8 Sim. 633.

(b) 8 Ves. 382.

(d) Coote, Mort. Appendix-

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very vagueness of the recital made it his duty to inquire. Had he done so, he would have found a surrender to Gilson for £1500, and to Bignold for £500. But it is not necessary to introduce the question of notice. It is said that this is a personal equity only against the mortgagor. There is authority, however, to show that it is not so; but that, on the contrary, it attaches to the land. If Whiteacre and Blackacre are mortgaged to B.; then Blackacre to C., and then Whiteacre to D.; if C. redeems B.'s whole mortgage, he shall hold both estates till he is repaid every thing in respect of B.'s mortgage and his own too: *Titley v. Davies*.^(a) [*The Vice-Chancellor*.—That case was mentioned to me by Mr. Lee, after the argument in *Barnes v. Racster*. Does it involve any other than the general principle, that if a man is mortgagee of two properties belonging to one mortgagor, [*384] the redemption cannot be split?] That principle *must apply here; otherwise the result will be that without any act done by the mortgagee to deprive him of his original right, the subsequent dealing by the mortgagor with his equity of redemption will alter that right. The original equities of the parties here are the same as in *Titley v. Davies*. The redemption which took place in *Titley v. Davies* was only the mechanical mode of working out those equities, and could not alter their

(a) Vin. Abr., Mortgage, (F), pl. 19, 20; S. C. 2 Eq. Ca. Abr. 604. The facts of this case will be found *infra*, p. 399; see also *Shepherd v. Titley*, 2 Atk. 348. The case of *Bovey v. Skipwith*, referred to in these cases, was in substance this:—A person granted a security out of a manor and rectory to A.; he then granted a security out of the rectory only to B., who had no notice of the prior incumbrance. B. afterwards, upon having notice, purchased in a precedent incumbrance on both the manor and rectory; and one question was whether, when B. had received all the money due on the first security, he was entitled to receive any more profits of the manor, or only to keep the incumbrance on foot to protect the rectory? The case appears to have been argued before the Lord Keeper *Bridgman*, assisted by Justices *Wylde*, *Twisden*, and *Rainsford*, and Baron *Wyndham*. It was held by the Lord Keeper, and, as it should seem, by two out of the four judges present, that B. should hold both the manor and rectory against A. till all due to him on both securities should be paid. *Bovey v. Skipwith*, 1 Ch. Ca. 201; S. C. 3 Rep. Ch. 37. It is remarkable that Mr Baron *Wyndham*, who appears to have been one of the dissentients from the judgment of the Court, was shortly afterwards an unsuccessful plaintiff in the case of *Wyndham v. Richardson*, 2 Ch. Ca. 212, in which a point similar to that in *Bovey v. Skipwith* was decided against him.

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original nature. The right of marshalling is an original equity, and does not commence with the filing of the bill. The decision in *Barnes v. Racster*, which, in our humble opinion, is right, is not necessarily applicable here. The present case is expressly excepted from the judgment in that case. Your Honor there expressly reserved the question what would have been the rights of Hartwright and Williams had Barnes's security upon No. 32 preceded and not been subsequent to Hartwright's security on Foxhall. There Hartwright insisted on a right which he did not possess. Here the plaintiff seeks to dispossess the Rounds & Co. of what, since 1833, they have been entitled to. *Aldridge v. Forbes*,^(a) *Lanoy v. Duchess of Athall*.^(b)

Mr. *Anderdon* and Mr. *James Parker*, for the defendant *Bignold*.

Mr. *Hurd*, for the defendant *Milbank*.

Mr. *Wigram*, in reply.

*THE-VICE-CHANCELLOR.—Certain freehold and copy- [385]
hold estates were vested in *Milbank*, subject to certain charges, amounting in the whole to £6000, which became vested in *Bignold*; and which, as far as *Bignold* was concerned, were charges upon the whole estates in this sense, that he could not be redeemed, except by consent, as to any part, without payment of the whole sum due. These charges, at the time the plaintiff took his security, were arranged thus:—the sum of £4000 was charged on the freehold property; £1500 on the copyhold property; and £500 on the freehold and copyhold property, *pari passu*. In the month of April, 1833, *Milbank* borrowed of the defendants, *Round & Co.*, the sum of £400, upon mortgage of the freehold only; and the security is so constituted, as to be subject, in terms, to a charge of £4500, and to that only. The amount of the sum so mentioned is accounted for by the circumstance already stated. Now, although the security was thus taken, it did not therefore carry with it notice of a security

(a) 4 Jurist, 20.

(b) 2 Atk. 446.

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upon any copyhold property whatever. The £500 charge was secured by two separate instruments. I have looked at the security for £500 upon the freehold property, and it does not mention or refer to the copyhold estate, or the copyhold security. It is therefore entirely consistent with the language of the security of the defendants, Round & Co., to say, that they took it and lent their money upon it, not only without notice of the security on the copyhold estate, but without notice of the existence of any copyhold estate at all. Whatever value may be attached to the observation, it must be taken that they lent their money without the prospect of any benefit from the copyhold estate, and in fact without any regard to it whatsoever.

In 1838, the plaintiff lent Milbank £600, and for that Milbank gives him security on the copyhold estate only; and expressly this security was to be subject to a charge of £1500, but [*386] £1500 only; namely, that sum of £1500 "already mentioned, which was charged on the copyhold alone. It was suggested very properly by Mr. *Russell* in argument, that the language of the plaintiff's security may be thought to lead to the inference, that the plaintiff had notice of the whole extent of Bignold's claims, or at least that there was sufficient to put him upon inquiry on the subject. Now it may be true that the recital in the plaintiff's deed is not worded with exact accuracy, because Gilson had not, as stated, surrendered the copyhold estate to the use of Bignold. But Bignold had acquired the substantial ownership of it as mortgagee; and I cannot hold that constructively or otherwise, the plaintiff had notice that the copyhold estate upon which he lent his £600, was subject to the £500 charge. If I am right in that view, he was a purchaser for value, without notice of any adverse title or claim in respect of this charge of £500, and without notice of its existence.

Supposing this conclusion to be correct, it follows that a wrong was done to the plaintiff by Milbank, because it was Milbank's duty to communicate to him the whole amount of charge upon the property, which he did not do. Milbank therefore committed that which in the view of a Court of Equity must be taken as a fraud; and by means of which the plaintiff lent his money upon an estate encumbered to an extent beyond what it was represen-

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ted to him to be. Now I am aware that the rule as to notice applies, generally speaking, more favorably to a defendant than to a plaintiff. I agree also in the general rule, that, as between parties claiming different equities, *qui prior est tempore, potior est jure*. Still the absence of notice is by no means a circumstance to be disregarded, even in a plaintiff's favor, especially where the equity prior in time is indirect, and the party claiming it has not done all to prevent fraud which he might have done. Here Messrs. Round & Co.'s equity is indirect, because they never took any security on the copyhold,—never thought of the copyhold,—“and cannot be disappointed if they get [*387] no benefit from it: and it may be a question whether it was not their duty to do more than they have done to prevent the copyhold estate from being subsequently dealt with; seeing that it was competent to Bignold and Milbank to treat this copyhold as not being subject to any equity.

Under the circumstances of this case, without entering into the general views upon which *Barnes v. Racster*, *Aldrich v. Forbes*, and possibly *Tilley v. Davies*, may have been decided, I cannot give, consistently with the rules of equity, that priority to Round & Co., which they claim. On the other hand, the plaintiff seems to claim too much in seeking to exclude them altogether from the copyhold estate. My present impression is, that the £500 should be considered as charged *pari passu* upon the freehold and copyhold estates.(a)

(a) Upon the subject of the principal case, and of *Barnes v. Racster*, see Story's Equity Jurisprudence, (3rd ed.) chapters 13 and 33. See also an article in the Jurist, vol. 7, part 1, p. 109, “Where there is a lien upon different parcels of land for the same debt, and the person who owes the debt has [subsequently] sold or transferred different parcels of the land, at different times, to different persons, as incumbrancers or purchasers, it has been held, that they are to be charged in the reverse order of the time of the transfers to them; that is to say, the parcels last sold are to be charged to their full value, and so backwards, until the debt is fully paid; for it is said that the last purchasers are to take only as far as they may, without disturbing the prior incumbrancers or purchasers, who, being prior in point of time, have a superiority of right. But there seems great reason to doubt whether this last position is maintainable upon principle; for as between the subsequent purchasers or incumbrancers, each trusting to his own security upon the separate estate mortgaged to him, it is difficult to perceive that either has, in consequence thereof, any superiority of right or equity

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June 21st.—The case was this day mentioned again, when *The Vice-Chancellor* said, that he had been thinking of [*388] it, and *expressed a doubt whether he ought not to grant the whole relief sought by the plaintiff.

The defendants' counsel then requested that the case might be re-argued, observing that the case of *Titley v. Davies*, as stated in the MSS. of Mr. *Melmoth* and Serjeant *Hill* had not been commented upon, and might materially affect the question. To this the *Vice Chancellor* acceded; and it was agreed that the cause should be re-argued.

June 26th.—The cause now stood for a second argument.

Mr. *Russell* and Mr. *Bacon*, for the defendants, Round & Co., relied on the case of *Titley v. Davies*, as extracted from the MSS. before-mentioned.(a) They also stated a circumstance which did not appear on the former argument; viz. that Bignold actually received the purchase money for the copyhold estate before he had notice of the plaintiff's security. They therefore contended, that if the property were considered as being converted into personalty upon the receipt of the money, the principles of *Dearle v. Hall*,(b) and *Loveridge v. Cooper*,(c) would be applicable to the case. If, on the contrary, the property were still considered as land, the dates of the deeds must determine the priority of the respective equities. In support of the defendant's claim, generally, they cited *Foster v. Cockerell*,(d) They also suggested that the Court-rolls were a sufficient notice to the plaintiff of the £500 security. *Pearce v. Newlyn*,(e)

Mr. *Wigram* and Mr. *R. W. E. Forster*, for the plaintiff, pursued the same line of argument as they had adopted on [*389] the former occasion. They also contended that the case *of

over the other. On the contrary, there seems strong ground to contend, that the original incumbrance or lien ought to be borne rateably between them, according to the relative values of the estates. Story Eq. Jur. § 1233.

(a) See post, p. 399.

(b) 3 Russ. 1.

(c) Id. 30.

(d) 3 Cl. & Finn. 456.

(e) 3 Madd. 168.

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Tilley v. Davies depended entirely on the effect of redemption, the second mortgagee acquiring, by virtue of a subsequent contract, and not by any original equity, the first mortgagee's rights.

June 29th.—THE VICE-CHANCELLOR.—It is unnecessary to recapitulate the documents or facts of this cause which has been so recently and with great propriety so fully argued; they are not indeed disputed. Upon the first argument I stated my impression to be that the plaintiff claimed against Messrs. Round & Co. more than he was entitled to claim against them, and that they claimed against him more than they were entitled to claim against him. The doubt which afterwards grew upon my mind as to the correctness of that impression, so far as it was against the plaintiff, led to the second argument, for which, as well as for the former, I feel myself indebted to the bar. I have never doubted upon the question of the too great extent of Messrs. Round & Co.'s claim. They did not become mortgagees of the copyhold estate—they did not take any charge upon it, or any covenant respecting it. There is no evidence that they had it in their view or contemplation. They advance their money upon a mortgage of the freehold estate alone—not only with knowledge of the existence and amount of Mr. Bignold's incumbrances upon it, but expressly and in terms subject to those incumbrances. I could not therefore view the plaintiff as seeking to deprive or disappoint Messrs. Round & Co of any right or benefit that they intended to contract for, or as seeking to place them in a worse position than that in which they had meant to place themselves, while on the other hand it is plain that the success, to any extent, of their claim against the plaintiff, must deprive him wholly or partially of that for which, as a mortgagee for valuable consideration without notice, he specifically contracted. He advanced his money directly upon the credit of the *copyhold estate—having it especially and particularly [*390] in view for his security as an estate charged with £1500 only. I say so, because I do not accede to the argument that he had notice of the £500 charge, or was in any default. Actual notice of that charge, it is not suggested that he had, nor, as I

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apprehend, did constructive notice to him of any document or fact arise from the circumstance of its being upon the Court-rolls of the manor, or mentioned in them. I conceive, that, though the plaintiff might have searched them, he was not, for any purpose now under consideration, bound to search them; and he is not proved to have searched them by himself or any agent. His security informed him that Mr. Bignold was a mortgagee of the copyhold property for £1500: Mr. Bignold, on behalf of the Norwich Union Society, was so, although having also a distinct further claim. The legal estate in the copyhold property was not obtained by or for the Norwich Union Society until after the year 1838; but that I apprehend is an immaterial circumstance.

The plaintiff, who does not appear to have had any notice of Bawtree's security, or of Gilson's security, or of Gilson's, or his son's, or Bawtree's, existence—except that, if any, constructively afforded by the security of 1838—was not in my opinion bound to make any inquiry of either of them, or of Mr. Bignold, or the Norwich Union Society. Neither Gilson, nor his son, nor Bawtree, appears to have known or had any notice of either of the securities for £500, or of the existence of the freehold estate, or of the existence of Messrs. Round & Co. as creditors or incumbrancers. The Norwich Union Society, though when paid off they would become trustees, or in a sense trustees, of the surplus, if any, of their securities, were incumbrancers; and they and their own trustees, though bound not to answer untruly any question that might be put to them, were in my opinion, at least while the

copyhold remained unsold, entitled to decline answering [*391] any question which might *have been addressed to them by the plaintiff upon the subject of the copyhold; unless, indeed, the plaintiff had proposed to redeem the Norwich Union Society, which it does not appear that he ever intended or desired. There is no trace of any communication between the plaintiff and the Norwich Union Society, or between the plaintiff and Mr. Bignold, or any other trustee of that society, until after 1838. I think, as I have said, that this circumstance is not one of laches or default on the plaintiff's part, the question being one entirely between him and Messrs. Round & Co.; for, whether with or without notice or default, the plaintiff could not claim, and has

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not claimed, to stand to any extent in priority to the Norwich Union Society, or in competition with them. It is true that Messrs. Round & Co. before 1838 gave notice to Mr. Bignold and the Norwich Union Society of Messrs. Round & Co.'s security on the freehold estate and, between the sale of the freehold estate, which, previously to the existence of the plaintiff's security, took place in that year under the Norwich Union Society's power of sale, and was completed at a later period, and the sale of the copyhold estate, which took place after 1838 under a similar power of sale, gave notice to Mr. Bignold and the Norwich Union Society of Messrs. Round & Co.'s alleged claim against the copyhold estate; and that it was not until after this latter notice, nor until after the receipt by Mr. Bignold of the purchase-money for the copyhold, that he or the Norwich Union Society had notice of the plaintiff's incumbrance; but, considering the respective interests and different positions of the several parties concerned, these circumstances did not, I apprehend, as between Messrs. Round & Co. and the plaintiff, advance or improve the claim of the former. It may be said, that, after the second of the notices from Round & Co., it was competent to Mr. Bignold, while ignorant of the plaintiff's security, to give Round & Co. the benefit of paying the £500 partially, if not wholly, out of the copyhold estate, and to settle with them on [*392] that principle without incurring any liability. This however was not done; and, notwithstanding the conversion of the copyhold into personalty by the sale, I think, both upon principle and authority (authority not confined to *Jones v. Jones*.(a)) that the notices, as I have said, did not gain for them a rank which otherwise they had not. I think that the rights of the plaintiff were fixed by his security of 1838, while the copyhold property was in every sense real estate—fixed at least for every purpose that the circumstances of the present case bring under consideration.

It has been indeed, but slightly, if at all, contended that *Loveridge v. Cooper*.(b) and *Foster v. Blackstone*.(c) apply to this case. It may be said, that to give Mr. Bugden relief is (assuming the

(a) 8 Sim. 633.

(b) 3 Russ. 30.

(c) 1 Myl. & K. 297.

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absence of notice and of default, to give him a greater benefit than belongs to him, seeing that he is suing and not sued, that he never acquired, though Messrs. Round & Co. also never acquired any legal estate, and that the general rule between equities is, that priority of time confers priority of gift. I do not find any substance in these objections. If it be conceded that Messrs. Round & Co. had or have an equity, the rule as to priority of time giving precedence between equities is by no means universal: it is open to various exceptions. The question of right in this cause seems to have been viewed by the counsel on both sides, and I think correctly, as standing neither more nor less favourably to the plaintiff than it would if the Norwich Union Society had been satisfied without selling the whole of the copyhold property, and the dispute between the plaintiff and Messrs. Round & Co. had been, which or whether either of them had the better title to claim the legal estate in the unsold portion of it from the society. On the grounds to which I have referred, I think that Messrs. Round & Co. would not [*393] have *had a better title than the plaintiff: my opinion against the larger proposition of these defendants is, I repeat, clear and without doubt.

With regard to the case before Lord *Hardwicke*, which was so particularly mentioned during the second argument, but was not, I think, cited at the bar in *Barnes v. Racster*, I did not decide that cause in ignorance or forgetfulness of *Tilley v. Davies*, which had been obligingly mentioned to me by a gentleman too extensively and accurately versed in the law of real property, not to render any communication from him upon such a subject highly acceptable and valuable—I mean Mr. *Lee*. Upon the present occasion I have had the advantage of reading, for the first time, the report of *Tilley v. Davies* contained in Mr. Searjeant *Hill's* manuscripts, as well as the MS. notes upon it in his copy of *Viner's Abridgment*; and I find that Lord *Hardwicke's* judgment, as given, and probably given with accuracy, in the former collection, contains some observations which appear to me to support the view that I took in *Barnes v. Racster*, and the view that I take of the larger proposition of Messrs. Round & Co. in the case now before me.

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In *Titley v. Davies*, Jenyns, having mortgaged three estates to Shephard, afterwards mortgaged one of them to Titley, and subsequently disposed of the two others severally, by way of mortgage and sale, to two other persons. It was held by Lord *Hardwicke* that Titley, redeeming Shephard, must have the same rights as Shephard would have had, if Shephard had bought Titley's mortgage, and could not be redeemed otherwise than entirely. The effect of which was to give him, upon redeeming Shephard, substantially a security for his original mortgage upon the two estates upon which he had originally taken no security; and this not against Jenyns merely, but against persons claiming under Jenyns for value. The right thus adjudicated to Titley went obviously beyond mere marshalling: because, had the estate originally mortgaged to him, *though exempted from Shephard's mortgage, been in- [394] sufficient to pay Titley, he would still have had a right to the two other estates, after satisfying Shephard's mortgage, as an auxiliary security. But that decision turning, I apprehend, merely on the settled rule that a mortgagee cannot be redeemed by parcels, was consequent and dependent upon the redemption of Shephard by Titley, the latter so becoming the owner of Shephard's mortgage. Supposing Titley not to have redeemed Shephard, would Lord *Hardwicke* have given Titley such rights as were given to him against Peyton or Davies? I conceive not. The following passages extracted from Mr. Serjeant *Hill's* manuscript seem to me to show exactly Lord *Hardwicke's* view. He says—"Taking it then in the strongest light as to Davies, it is that he might redeem the leasehold by paying the whole that was due to Titley; and the consequence of this is, that Titley had a right to hold the whole premises till both debts were paid. In 1 *Chanc. Ca.* 201, before Lord Keeper *Bridgman*, assisted by the Judges, they seem to take this in nature of an *elegit*, and did not consider the rule of this Court as to mortgage creditors, but the Lord Keeper overruled it, and was of opinion the defendant should hold the manor and rectory till the whole was paid him. What is said by Lord *Hale*, in the case of *Marsh v. Lee*, is likewise to the present purpose."

"It is objected, how could Titley have a right to be satisfied

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out of an estate never made liable to his debt? By purchasing in the first mortgage, and thereby acquiring the rights of the first mortgagee, is the answer. This is the general reason on which this question is to be determined, and on which it was determined in the original case of *Mr. Davies*.” * * * *

“I do admit the right which Shephard has to be redeemed entire, and the right which Titley has to be redeemed the whole;

and that arises on the right of Shephard which he has

[*395] at the time the redemption is called *for; and therefore,

in the case put on the argument, suppose Jenyns, after the mortgage that Titley had, had paid off Shephard; Titley would have had no remedy but against the freehold lands; because then Jenyns, and not Titley, would have stood in the place of Shephard. I agree, likewise, if Shephard, by agreement with Jenyns, had conveyed to Peyton the fee-farm rents, he should have held them discharged from Titley; because, though Titley had once a possibility of having them, yet, as they were not liable to Shephard at the time Shephard's mortgage is called for, I could derive no title to Titley to those rents under Shephard; and therefore it will be necessary to consider those articles by which Shephard covenants that if his mortgage was paid by the instalments agreed on, he would not foreclose the land or fee-farms rents, but if they failed of the payment, it was open to him, and he has not parted with any right he had in him. Another clause is, that when his money shall be paid off in manner as aforesaid, he will convey all his title in the lands and leasehold premises to Davies and his interest in the fee-farm rents to the trustees of the said Sir Thomas Peyton; but till that is done, they are fully in his power, as if the articles had been never made; and if so, as Davies never paid anything to Shephard, so Shephard never parted with anything.

“Now it remains to be considered how these articles stand as to Titley: it is certain Shephard could not, by any agreement with Jenyns and Peyton, exclude the mesne mortgage without discharging his own security; for all the right Shephard had in him at the time of calling in the mortgage must go to Titley; but he did not lessen his own security by these articles. And I am therefore of opinion (though I am very sorry for it,) yet as the

 1843.—*Bugden v. Biguold*.

rules of law must take place, that that part of the decree, which dismisses the bill as to Peyton, must be reversed."

In the case before me, the Norwich Union Society never *have been redeemed. They have paid them- [396] selves by the application of a part of their security; and their mortgages never having been in one hand with that of Round & Co. I conceive that the principle of the decision in *Titley v. Davies* is not adverse to the present plaintiff. I think the marshalling claimed by Round & Co. excluded, because the plaintiff took, in my opinion, his security, without notice that it was subject to more than the £1500, and without laches or default as between him and them, and because Round & Co., without marshalling, are left at least in the enjoyment of all that they contracted for, in the mode and form in which, and according to the quantity for which, they, whether ignorant or not ignorant of the existence of the copyhold estate, contracted. To borrow expressions used by Lord *Hardwicke* in *Titley v. Davies*, and by Sir *Edward Sugden* in *Blunden v. Lord Desart*,^(a) and another case recently before him, there was I think, at the utmost only a possibility of an equity, or a potential equity, in Round & Co. for their larger claim against the copyhold estate, which the dealing that took place as to the copyhold estate prevented from arising. This, however, would only lead to apportioning the £500 between the freehold and the copyhold. It is, as I have said, the plaintiff's claim to more that has embarrassed me. The nature of the documents and facts before me—the principles stated in one at least of the reports of *Burgh v. Francis*,^(b) in *Finch v. Lord Winchelsea*,^(c) *Brace v. Duchess of Marlborough*,^(d) *Pomfret v. Lord Windsor*,^(e) and *Ex parte Knott*,^(f) may probably be, with some semblance, at least, of reason, represented as being in favor of that claim; which is contended to be entirely consistent with *Lanoy v. D. of Athol*, *Titley v. Davies*, *Aldrich v. Cooper*, *Averall v. Wade*, and *Aldridge v. Forbes*. It may be argued [397] to be consistent with every document and fact in the

(a) 2 Dr. & W. 405; 2 Con. & L. 111.

(b) Rep. t. Finch, 8; 1 Eq. Ca. Abr. 320; 3 Swanst. 536, n.

(c) 1 P. W. 277.

(d) 2 P. W. 491.

(e) 2 Ves. sen. 472.

(f) 11 Ves. 609.

 1843.—*Bugden v. Bignold*.

cause, to suppose it possible, and not improbable, that the very object and intention of Milbank in giving Messrs. Round & Co. such security, and such only as he did, in the form in which he gave it, may have been to preserve to himself the power of dealing afterwards for value with the copyhold property—of making it subservient to his necessities in a state of freedom from any claim on their part. It may be argued that Milbank may have considered the value of the two properties, and the nature of the incumbrances, to have been such, as that the copyhold might be fairly treated as substantially, and in effect, liable to no more than £1500, until the security of 1838 was made; and must, upon the theory of Messrs. Round & Co., be considered as having committed a fraud on the plaintiff by representing it to him, as Milbank did in 1838, to be then charged with no more; and this whether the statute of 4 & 5 Will. 3, c. 16, against fraudulent mortgages, could or could not be deemed to extend to the case; while, it may be argued, upon the opposite theory, the conduct of Milbank would be certainly much less censurable. His covenants, too, contained in the security of 1838, may be thought not unworthy of attention. Again, if there had been no power of sale in Mr. Bignold, and if, while the legal estate in the copyhold was outstanding in Bawtree, the copyhold had been sold by Bignold and Milbank to a purchaser for value,—and it may be doubted whether, according to one of the cases put by Lord *Hardwicke* in his judgment in *Titley v. Davies* the purchaser, though without the legal estate, would not, in Lord *Hardwicke's* opinion, have been entitled to hold his purchase against Round & Co.,—should the plaintiff, it may be asked, stand in a worse position than such a purchaser? Or can the fact of Bignold having been a stranger to the security of 1838 make, for the purpose of the present question, any difference? I confess myself not satisfied that the *mere abstract justice of the case is not in favor of the plaintiff's larger claim; but I am fearful, by giving way to it, of infringing those settled rules forming part of a system, which, intended and calculated in general to do justice, must not be broken down in favor of individual cases of actual or supposed hardship.

1843.—*Bugden v. Bignold*.

The mortgage debt of £500 was made a charge, rateably and without preference, on the freehold and copyhold properties. *Prima facie* they must bear it rateably and without preference. It lies upon those who assert that a different course should take place, to make and prove a case for it. That they should raise a doubt is not sufficient. The plaintiff's case has raised a great doubt, but not absolute conviction, in my mind, in his favor. While on one hand I cannot view the mortgage of the freehold made to Round & Co. as tantamount to a mortgage of both freehold and copyhold to them (to which length their argument seems to go,) so on the other hand, I am not convinced that the form of their security is equivalent to a renunciation by them of any benefit derivable from any collateral or other security that the Norwich Union Society might hold: and strong as the moral justice of the plaintiff's claim may apparently be, it must not be forgotten that as a general rule,—a rule not without exceptions, but certainly a general rule of our jurisprudence,—equities take effect according to their priorities in point of time.

On the whole, with considerable hesitation, and almost with regret, I do not change that part of the decision announced originally by me as probable, which was against the plaintiff. Consequently the £500 must be thrown proportionally on the freehold and copyhold. I may add, that the opinions of three distinguished lawyers with whom I have had the advantage of communicating upon the case, agree with this conclusion. I have not referred to any possible claim on the part of Milbank's wife, whose estate the freehold property appears to have been, and whose concurrence in charging it as it was [*399] charged by them, may have been in the nature of suretyship. She is not a party to the suit, and any such point has not been, if it could usefully have been, adverted to.

No decree was drawn up in this case. The parties settled their dispute upon the principles contained in the judgment of the *Vice-Chancellor*.

 1743.—*Titley v. Davies.*

Between CHARLES TITLEY, Clerk, *Plaintiff*; JAMES JENYNS, SAMUEL SHEPHEARD, SIR THOMAS PEYTON, Bart., THOMAS DAVIES and others, *Defendants*. And between SAMUEL SHEPHEARD, *Plaintiff*; and CHARLES TITLEY, THOMAS DAVIES, JOHN CHUMLEY, (*assignees of Jenyns, who had become insolvent,*) SIR THOMAS PEYTON, GEORGE DASHWOOD, RICHARD DASHWOOD and others, *Defendants*.

T. T. 1743.

Mr. Jenyns made a mortgage to Shephard for £4000, of three different estates, namely, an estate called Lynwood Farm, in Cambridgeshire, an estate at Westminster, and certain fee-farm rents elsewhere. Afterwards Jenyns made (which was the second in point of time) a mortgage to Titley, and comprised therein nothing but Lynwood Farm; after this, Jenyns made an absolute sale of the fee-farm rents to Sir Thomas Peyton, and afterwards Jenyns made another mortgage to Davies of the Westminster estate; and *Titley having paid off Shephard's mortgage*, was decreed to hold as well the Westminster estate as Lynwood Farm, until he was paid, as well what was due to him upon the mortgage originally made to himself, as what he had paid to Shephard upon his mortgage; and upon a rehearing, Titley was also decreed to hold the fee-farm rents until he was paid all that was due to him upon both his securities. *Titley v. Peyton and others*, Trin. Term, 16 and 17 Geo. 2, in Chan. by Lord *Hardwicke*; and his former decree, whereby the plaintiff's bill stood dismissed against Sir Thomas Peyton, was varied. And, as I heard, Lord *Hardwicke* held, that if Jenyns had not made any mortgage to Davies of the Westminster estate, Davies [qu. Titley] would have had a clear right, as against Jenyns, to have redeemed Shephard, and have detained both estates till he was satisfied both debts; and if this be so, then, by making the mortgage of Lynwood Farm (which was second in point of time) to Titley, Jenyns conveyed to him a right of redeeming the whole and retaining as aforesaid; and if so, then, by afterwards making the mortgage to Davies, it was impossible for Jenyns to alter that equitable right conveyed by him to Titley.—Mr. Serjeant Hill's note to Viner, Vol. 15, p. 447. [See also, R. L. 1742, B. fo. 593.]

On the 1st July, 1725, the defendant Shephard lent the defendant Jenyns £4000; and by lease and release, dated the 1st and 2nd of the said July, Jenyns conveyed to Shephard fee-farm rents of 74l. 6s. 5d. a year, payable out of the manor of Dodington, in the Isle of Ely, and certain lands called Lynwood Farm, and the closes of land thereto belonging, in Wimblington and March, in the said Isle of Ely, for securing the said £4000 and interest; and, as a *further security* for the same, Jenyns by another indenture, dated the 3rd of the same July, assigns over to Shephard [400] heard several leasehold houses at Westminster held, of the Dean and Chapter of Westminster, and Christ's Hospital, which assignment was registered in the Register's Office for the county of Middlesex.

The 24th June, 1728, the defendant Jenyns mortgaged to the plaintiff the said farm called Lynwood Farm only, and the lands thereto belonging, in March and Wimblington, for £2000.

The 18th of December, 1729, the defendant Jenyns sold the fee-farm rents to Sir Thomas Peyton for £1849, or thereabouts, without notice of Shephard's mortgage, and Shephard afterwards consented to the sale.

The defendant Jenyns being indebted to the defendant Davies in a large sum of money, for securing the sum of £——, part thereof, with interest, he, the said Jenyns, by indenture, dated the 25th September, 1731, assigned over to Davies (amongst

1743.—Tittley v. Davies

other things) the equity of redemption of the said leasehold estate at Westminster, which assignment was registered in the said Register's Office for the county of Middlesex, and defendant Davies did not then know that Jenyns was in any way indebted to the plaintiff, or had made any security to him whatsoever.

After the said mortgage made to Davies, Davies entered into an agreement with Shephard, with the privity and consent of Jenyns, touching paying off the said £4000 and interest to the defendant Shephard; and thereupon, by indenture quadripartite, dated the 25th April, 1732, between the defendant Jenyns, of the first part, the defendant Shephard, of the second part, the defendant Sir Thomas Peyton, of the third part, and the defendant Davies, of the fourth part; reciting, (among other things,) that the defendant Shephard had agreed to take from the defendant Davies the said £4000, at £600, a year, until the same, with interest, should be fully paid; the defendant Davies thereby covenanted to pay the same accordingly: and the defendant Shephard agreed to accept the same, and that, until default of payment, he would not commence any action or suit for the said £4000; and that the defendant Davies should receive the rents of the leasehold premises to his own use; and that, as soon as he, the said defendant Shephard, should be paid the said £4000 and interest, he would assign all the said lands and the said leasehold premises to the defendant Davies.

The defendant Davies, in pursuance of the said agreement, entered upon the said leasehold premises, at which time the same were in very ruinous condition, and almost untenanted for want of repairs; and the defendant Davies afterwards laid out a large sum of money in the repairs thereof, and was at great expense and trouble in getting the same tenanted. And the said defendant Davies, in pursuance of the said agreement, paid the defendant Shephard several sums of money, amounting, in the whole, to the sum of £——, towards discharge of his said mortgage, so that there was due to Davies, on his said security, over and above what he had received out of the rents of the said leasehold premises, including what he had paid to the defendant Shephard as aforesaid, the sum of 2965*l.* 16*s.* 10*d.*, as appeared by an account stated *by him with Mr. Serjeant Hawkins, and Mr. Studley [*401] on the behalf of the defendant Jenyns.(a)

In Trinity Term, 1732, Tittley filed his bill against the before-named several defendants, praying that the defendants Shephard and Davies might account for what they had or might have received out of the rents and profits, and that the prior mortgagees might assign their mortgages to plaintiff, on payment of the money due thereon. The defendants put in their answers; Davies insisting on the agreement made with Shephard, and Sir Thomas Peyton insisting that he was a purchaser without notice, and that the fee-farm rents were not included in the plaintiff's security.(b)

On the 22nd February, 1736, the cause came on to be heard before Sir J. *Jekyl*, M. R., when his Honor ordered the plaintiff's bill to be taken *pro confesso* against Jenyns, (who had absconded,) and to be dismissed as against Peyton without costs, and decreed an account of what was due on the several mortgages, and that Tittley might redeem Shephard, (save as to the fee-farm rents,) and that Davies might redeem Tittley, by paying his mortgage and what he had paid Shephard, &c.

Some doubt arising before the Master, upon taking the account, whether a judg-

(a) From Melmoth's MSS.

(b) Hill's MSS. vol. 3, fol. 390.

 1743.—*Titley v. Davies.*

ment debt of £800, due from Jenyns to Shephard, ought to be paid, as well as the mortgage debt, before Shephard could be redeemed, a bill was filed by Shephard against Titley, Peyton, and others, to enforce that equity. [*Vide supra*, and 2 Atk. 348] In his answer to that bill, Peyton insisted on the decree at the Rolls, and the affirmance of it by the Lord Chancellor, and also on want of notice, as before; but he admitted, that, after the purchase of the fee-farm rents, he settled them on his wife by way of jointure, with notice that they were included in Shephard's mortgage.

The cause of *Shephard v. Titley* coming on for hearing on the 17th July, 1743, before Lord HARDWICKE, C., his Lordship directed the hearing to stand over, [see 2 Atk 354], and the cause of *Titley v. Davies*, to be re-heard with it; and now judgment was pronounced in both causes.

Lord HARDWICKE, C.(a).—There is more difficulty concerning the equity of redemption in this case than ever I knew, and therefore I took time to consider of it; and the more I consider of the former decree, the more I am confirmed in my original opinion upon this question. I know some hardships will be in this case, but so they must be in all. There are two general points:—The first arises on Shephard's original cause; and the second is insisted on by Mr. Titley as consequential to the first. As to the first, whether the plaintiff Shephard is entitled in equity to tack this judgment of £800, confessed in 1731, to the original mortgage, that is a settled and clear point: if a man has a mortgage on an estate of a mortgagor, who afterwards makes a second mortgage, and afterwards the first mortgagee [*402] lends a sum of money to the mortgagor, on a judgment *or statute*, without notice of the mesne mortgage, he, having a prior legal estate, shall not be compelled to be paid off or redeemed until the judgment or statute is paid off, because that was a lien on the legal estate; and not having notice, he has equity on his side too; and so it was held by the Master of the Rolls, in a case of *Brace v. Duchess of Marlborough*; and this is the single question as to Shephard on the first part. (2 Wms. 494.)

As to the second question:—That which is insisted on by Mr. Titley, (the plaintiff in the original cause,) as consequential to the former, is, whether he has a right to redeem all the premises, and retain the whole, till he is paid not only what he pays to Shephard, but also what is due on his own mortgage.

Now this arises on the different nature of the mortgages, and the manner of Jenyns transacting them: the first being a mortgage of a fee-farm rent, an estate in land, and a leasehold estate, all which are comprised in Shephard's mortgage in July, 1725; the second mortgage was made to Titley in 1728, for the sum of £2000 and interest; that comprised only the lands in Lynwood Farm, in Cambridgeshire; and after, he sold the fee-farm rents to Sir Thomas Peyton; and then the last mortgage was in 1731 to Davies, and that comprised nothing but the leasehold estate; and this has been determined as between Titley and Davies in the first cause, as to all, except the fee-farm rents of £74; and as to that, the bill has been dismissed. It has been insisted on by Mr. Titley's counsel, that Titley has the same equity against Peyton as he had against Davies: to which Peyton's counsel answered, that it was not now a proper time to make this question, as it's a petition of re-hearing of

(a) Hill's MSS. vol. 3, fol. 390.

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Shepherd, complaining that he is not allowed the sum of £300, and therefore nothing ought to come in question but what concerns the matter of the petition. But there is another rule, that where another party is consequently concerned, the court must take that into consideration; and I think that Davies is consequently concerned, because, by the petition, Shepherd is endeavoring to bring a new charge of £300 upon the estate; and Mr. Titley might be apprized at the time of the former hearing that this new sum was lent, in which case he could not now have brought before the Court the matter which had been before determined; but it is very different when a new charge is brought upon the estate; and therefore, as this is a new charge brought upon the estate, and what arises consequential upon it may tend to enlarge Titley's securities, it must open that point to Davies; and that brings it to the equity of the case, whether Titley is entitled to compel Peyton to redeem the whole or stand foreclosed. And I shall consider, first, as to the ground and the reason of the former resolution with regard to Davies's and, secondly, how Peyton's case differs from Davies's. As to the first, I at that time entered pretty fully into the nature of the case, and thought it necessary to consider two things: whether this Court could oblige Titley and Davies to contribute jointly to pay off Shepherd, according to their respective rights; or, if the Court could not do that, whether it could decree, after Titley had redeemed Shepherd, that Davies should redeem [*403] Titley, in the proportion that the leasehold estate bears to the whole. Now, I was then, and still am, of opinion, that this Court could do neither of these things; for, as to the first, Shepherd is the person most materially concerned, and whoever redeems him must redeem the whole; and in that light he stood as to Jenyns, the mortgagor; and if so, should it be said, that, by the turning over his right to Titley and Davies, it could at all alter the equity of redemption as to Shepherd's? No, sure; if so, it would be attended with infinite inconvenience; for the mortgagor, after mortgaging his estate, may split it into twenty parts, and then the mortgagee could not be redeemed or foreclosed until all those shares were settled; and who would lend money on land if this was the case? And I did then inquire of the registers (one of whom is now in Court) if any such decree was to be found, and they informed me there was not.

And as to the next question, it is to be considered, that if there had been no subsequent mortgage to Davies, then Titley would have had a right to redeem Shepherd of the whole, and to hold the whole against the mortgagor, till his own debt was paid; and therefore this shows, that, by making the two mortgages to Titley before that to Davies, Jenyns had given his whole right to Titley, and, if so, it was impossible by such subsequent mortgage to Davies for him to prejudice the former mortgage to Titley.

Taking it then in the strongest light as to Davies, it is, that he might redeem the leasehold, by paying the whole that was due to Titley; and the consequence of this is, that Titley had a right to hold the whole premises till both debts were paid. In 1 Cha. Cases, 201, before Lord Keeper Bridgman, (assisted by the Judges,) they seem to take this in nature of an *elegit*, and did not consider the rule of this Court as to mortgage creditors, but the Lord Keeper overruled it, and was of opinion the defendant should hold the manor and rectory till the whole was paid him. What is

 1743.—Titley v. Davies.

said by Lord Hale, in the case of *Marsh v. Lee*,^(a) is likewise to the present purpose.

It is objected, how could Titley have a right to be satisfied out of an estate never made liable to his debt? *By purchasing in the first mortgage, and thereby acquiring the right of the first mortgage*, is the answer.—This is the general reason on which this question is to be determined, and on which it was determined in the original case of Mr. Davies.

The next question is, how far the case of Peyton differs from that of Davies with regard to Titley, for, as between each other, I think there will be a difference;

and it is first to be considered, how Peyton's estate stood before the articles, [404] and exclusive of them: now, as to that, I can see no difference between

Peyton and Davies; for, though one is a purchaser, and the other a mortgagee, that will not differ the case as to Titley, for they are both considered as purchasers in this Court *pro tanto*; and, besides, Peyton is only a purchaser of the equity of redemption, for Shephard has the same right to be redeemed by Titley, as Titley has by Peyton; and I did not find the counsel for Sir T. Peyton insist much on the difference between them before the articles, but very properly labored the second question, how it differs on the fact, and with the aid of those articles, which must be considered, and, when they are considered, they will be found to make no difference at all, although one would be sorry for it, as it will be a hard case.

I do admit the right which Shephard has to be redeemed entire, and the right which Titley has to be redeemed the whole; and that arises on the right of Shephard, *which he has at the time the redemption is called for*; and, therefore, in the case put on the argument, suppose Jenyns, after the mortgage that Titley had, had paid off Shephard; Titley would have had no remedy but against the freehold lands; because then Jenyns, and not Titley, would have stood in the place of Shephard. I agree, likewise, if Shephard, by agreement with Jenyns, had conveyed to Peyton the fee-farm rents, he should have held them discharged from Titley; because, though Titley had once a possibility of having them, yet, as they were not liable to Shephard at the time Shephard's mortgage is called for, I can derive no title to Titley to those rents under Shephard; and, therefore, it will be necessary to consider those articles by which Shephard covenants, that, if his mortgage was paid by the instalments agreed upon, he would not foreclose the land or fee-farm rents; but if they failed of the payment, it was open to him, and he has not parted with any right he had in him. Another clause is, that, when his money shall be paid off in manner as aforesaid, he will convey all his title in the lands and leasehold premises to Davies, and his interest in the fee-farm rents to the trustees of the said Sir Thomas Peyton; but till that is done, they are fully in his power, as if the articles had been never made; and, if so, as Davies never paid anything to Shephard, so Shephard never parted with anything.

(a) 2 Ventr. 339.—“If a man is seised of sixty acres, and mortgages twenty to A., and then the mortgages the whole to B., and then the whole to C., and afterwards C. purchases in the first mortgage, that shall not protect more than the twenty acres; but it shall protect those twenty acres, so as B. shall never recover that, until he pay C. all the money upon the first and last mortgage.”

1743—Titley v. Davies.

Now, it remains to be considered how these articles stand as to Titley: it is certain Shephard could not, by any agreement with Jenyns and Peyton, exclude the meane mortgage without discharging his own security; for all the right Shephard had in him at the time of calling in the mortgage must go to Titley; but he did not lessen his own security by these articles. And I am therefore of opinion, (though I am very sorry for it,) yet, as the rules of law must take place, that part of the decree, which dismisses the bill as to Peyton, must be reversed.

Then, how does the case stand between Davies and Peyton? And as to that, I think Mr. Davies will be obliged to redeem the whole, and not to have any conveyance of the fee-farm rents; and, upon this ground, I said there would be a difference between them. And my first reason is, that it is part of Davies's agreement that he would pay off the £4000, having the rest of the land, except the fee-farm rents; but here it may *be objected, that Davies did not know of [*405] Titley's security, and therefore he should not be put in a worse condition than if it had not been in the hands of Shephard: but, at the time of Jenyns's original mortgage to Davies, Jenyns himself had no right at all in him, for the sale to Peyton was preceding the mortgage to Davies, and therefore he had no right of redemption in him. But suppose he had, by absolute conveyance, given Davies the equity of redemption of the fee-farm rents, when he had before sold them to Peyton, should Davies have any right? No doubt he should not; for "qui prior est tempore, potior est jure," and therefore if he redeems at all, it must be on payment of what arises on the lands and leasehold estates. If Peyton *had had only a mortgage*, then indeed Jenyns would have had a right of redemption, and might have given that to Davies; the consequence of the whole is, that the decree of 22nd February, 1736, and the decree affirming the same (save as to the part whereby Titley's bill is decreed to be taken *pro confesso* against Jenyns) must be reversed; and in both causes, I must declare, that, on the 1st July, 1728, the sum of £800, part of the principal money due on Shephard's mortgage, was paid by Jenyns to Shephard, and the subsequent interest to the time of the judgment should cease; but then it should be entered in the minutes, that the deposition of Stridley, as to the actual payment of the money, was read; for, though the counsel chose to admit that, rather than to have it read here, on account of another part of it, yet if it should go to another place, that may be raised as an objection. [His Lordship then decreed an account of what was due to Shephard for principal and interest on his mortgage, and on judgment, and his costs to be taxed, &c.; Shephard to account for rents and profits received by him, or which, without his wilful default, might have been so received; Davies to be paid by Shephard what he had expended in necessary repairs; upon payment to Shephard of what should so be found due to him, and what he should have paid to Davies for repairs of the leaseholds, Shephard to convey to the plaintiff; in default of the plaintiff paying what was so due to Shephard, and what he should have so paid, the plaintiff's bill to be dismissed with costs and he to be foreclosed; but upon his paying Shephard, the Master to compute what was due to the plaintiff for principal, interest, and costs, &c., with liberty to Peyton and Davies successively to redeem.]

 1843.—*Skey v. Bennett.*

SKEY V. BENNETT.

1843: June 24th.

A bill may be maintained by a mortgagee on behalf of himself and all other the creditors of a deceased mortgagor.

IN October, 1839, James Bennet, being indebted to the Gloucestershire Banking Company in the sum of £4800, deposited with them the title-deeds of certain coal-mines by way of equitable mortgage for securing repayment of the debt. A [*406] written memorandum, with a power of sale, *accompanied the deposit. Upon the death of Bennett, intestate, the present bill was filed by the plaintiff, as the public officer of the Gloucestershire Banking Company, "on behalf of himself and all other the creditors of James Bennett deceased," against the heir-at-law, and the administratrix of Bennett, praying an account of what was due for principal, interest, and costs on the mortgage security, and that the same might be raised by sale of the mortgaged premises, and that the balance, if any, which might be due, after realizing the security, might be paid to the plaintiff rateably with the other creditors of the intestate, and for the common creditors' decree, &c.

Another suit had been instituted in which the common creditors' decree had been obtained.

Mr. *Russell* and Mr. *Wilcock*, for the plaintiff.

Mr. *Whatley*, for the defendants, submitted that the bill could not be sustained by the plaintiff as mortgagee, and also on behalf of himself and all other the creditors of the intestate, the rights of the mortgagee and the other creditors being inconsistent. He cited *Burney v. Morgana*,^(a) *Greenwood v. Firth*,^(b) *Raikes v. Hall*,^(c) *Milligan v. Mitchell*.^(d)

THE VICE-CHANCELLOR said that it had been the constant

(a) 1 S. & S. 358.

(c) 3 Y. & C. 605, cited.

(b) 2 Hare, 241, n.; 6 Jurist, 757.

(d) 3 Myl & C. 84.

1843.—Skey v. Bennett.

practice of this Court to allow bills to be framed by mortgagees on behalf of themselves and all other the creditors of a deceased mortgagor. The plaintiff, therefore, was entitled to the ordinary decree as equitable mortgagee. His Honor added that he would also give the plaintiff the general creditors' decree, if it were of any use to him; but as a decree of that nature had been already obtained in another suit, it would be useless to do so.

*BARNETT V. WILSON.

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1843: July 4th and 8th.

By a marriage settlement, the lands of the wife were limited to such uses as she should, notwithstanding her coverture, by deed or will appoint; and in default of appointment, to the use of the children of the marriage. After the husband's death, the wife, by way of appointment under the power contained in the settlement, executed three successive mortgages of the property in fee. Each mortgage deed contained a trust for sale, in default of re-payment of the mortgage money; but the language of the two latter deeds differed from that of the former, not only as to the trust for sale, but as to the proviso for reconveyance, and in other respects:—*Held*, that, having regard to the construction of the latter deeds taken by themselves, and also in comparison with the former, the wife must be considered as having intended to devote the whole property to purposes beyond those of mere mortgage securities, and consequently that by the latter deeds, or one of them, the power was exhausted.

By indentures of lease and release, bearing date the 4th and 5th October, 1816, made in contemplation of the marriage of Robert Bell with Isabella Taylor, certain freehold and copyhold estates, property of Isabella Taylor, were conveyed and assured to the use, after the marriage, of Robert Bell for life, with remainder to trustees to preserve the contingent remainders, with remainder to the use of Isabella Taylor for life, with remainder to the use of such person or persons, and for such estate or estates, &c., as the said Isabella should, notwithstanding her coverture, at any time or times, and from time to time, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by her

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executed and to be attested as therein mentioned, or by her last will and testament to be by her signed and published and to be attested as therein mentioned, direct and appoint, and in default of such direction or appointment, and so far as the same should not extend, to the use of all the children of the marriage as tenants in common in tail, with cross remainders between them in tail, with remainder to the use of Isabella Taylor in fee.

The marriage took effect, and Robert Bell died in March, 1830, leaving Isabella Bell, his widow, and several children, surviving him.

By an indenture of release, bearing date the 19th February, 1831, grounded on an indenture of lease bearing date the day previous, and made between Isabella Bell of the one part, and James Braithwaite of the other part, after reciting the indenture of settlement of the 5th October, 1816, it was witnessed, that, in consideration of the sum of £1100 advanced and lent to Isabella Bell by Braithwaite, Isabella Bell granted and released the hereditaments and premises therein mentioned, being part of the hereditaments comprised in the indenture of settlement, unto and to the use of Braithwaite, his heirs and assigns, during the life of the said Isabella Bell, and did also, in pursuance and in exercise of the power and authority contained in the indenture of settlement, direct and appoint that from and after her decease, the same hereditaments and premises should be and enure to the said James Braithwaite, his heirs and assigns, for securing to him, his executors, administrators, and assigns, the repayment by the said Isabella Bell, her heirs, executors, administrators, or assigns, of the said sum of £1100 and interest thereon, as therein mentioned. The indenture of release contained a power for said James Braithwaite, in case of default of such repayment, to sell all or any part of the hereditaments and premises thereby conveyed, limited, and appointed, for the purpose of raising the said sum of £1100 and the interest thereof; and it was declared, that, out of the proceeds of such sale, the said James Braithwaite should retain all the expenses attending such sale, and the principal and interest then due to him, and should pay the residue of such produce unto the said Isabella Bell for her own use and benefit, and should stand possessed of

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the residue of the said hereditaments and premises *for such uses and upon such trusts as were in and by said indenture of settlement declared concerning the estates thereby settled*. The release also contained a proviso, that, in case full payment should be made of the said sum of £1100 and interest, the said James Braithwaite should convey the hereditaments and premises therein comprised *upon such trusts as the same would have been liable to in case such indenture had not been made*.

By an indenture, bearing date 13th February, 1833, and made between Isabella Bell of the first part, James Cartmell *and James Birkett of the second part, and Thomas [*409] Ullock of the third part, after reciting the indenture of settlement of the 5th October, 1816, it was witnessed, that, in consideration of two several sums of £200 and £200, then lent and advanced to her as therein mentioned, Isabella Bell, by virtue and in exercise of the power and authority given or reserved to her by the settlement, did direct, limit, and appoint that all the freehold and customary-hold hereditaments and premises comprised in the indenture of settlement should thenceforth remain, continue, and be to the only proper use of the said James Cartmell, James Birkett, and Thomas Ullock, their heirs and assigns, for ever, upon trust that, in case of default being made of the repayment by the said Isabella Bell of the said two sums so lent and advanced to her, and the interest thereof, according to the proviso in that behalf therein contained, it should be lawful for the said James Cartmell, James Birkett, and Thomas Ullock, their executors, administrators, and assigns, to sell and dispose of the said hereditaments, and out of the produce of such sale to retain and pay all expenses attending such sale, and also the said sums of £200 and £200, and the interest thereof, and to pay the surplus, if any, into the proper hands of Isabella Bell, her executors, administrators, or assigns. And it was by said indenture declared, that, in case the said Isabella Bell, her heirs, executors, or administrators, should repay the said two principal sums and the interest thereof, at the time and in manner therein mentioned, the said James Cartmell, James Birkett, and Thomas Ullock, their heirs or assigns, should, at the request of the said Isabella Bell, her heirs or assigns, convey the premises

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thereby appointed, with their appurtenances, unto and to the use of said Isabella Bell, her heirs or assigns, free from all incumbrances effected by them, the mortgagees.

By indentures of lease and release of the 13th and 14th [410] February, 1834, made between James Braithwaite of *the first part, Isabella Bell of the second part, and Thomas Jackson Scales and Margaret Scales of the third part, after reciting the indenture of settlement and the indenture of release of the 19th February, 1831, it was witnessed, that, in consideration of the sum of £1100 to the said James Braithwaite, and £500 to the said Isabella Bell then respectively paid by the said Thomas Jackson Scales and Margaret Scales, James Braithwaite granted, bargained, sold, and released, and Isabella Bell, by virtue and in pursuance of the power of appointment given or reserved to her by the settlement, did direct, limit, and appoint, and grant, release, and convey, the freehold hereditaments and premises comprised in the indenture of February, 1831, unto the said Thomas Jackson Scales and Margaret Scales, their heirs and assigns for ever, freed from the proviso for redemption contained in the indenture of February, 1831, but subject to the proviso therein contained; and the said Isabella Bell did thereby also direct, limit, and appoint, grant, release, and convey, unto said Thomas Jackson Scales and Margaret Scales, their heirs and assigns, all the freehold and customary hereditaments and premises comprised in said indenture of settlement, subject to the proviso for redemption thereafter contained.

The indenture then contained a power of sale of the premises, and a declaration of trust of the produce of the sale, in case of default of payment of the sums of £1100 and £500 in the same terms *mutatis mutandis* as were used in the preceding indenture of the 13th February, 1833. It also contained a proviso, that, on repayment by Isabella Bell, her heirs, executors, or administrators, of the said two sums to the mortgagees at the time and in manner therein mentioned, the mortgaged premises should be reconveyed to Isabella Bell, her heirs and assigns, by the mortgages, free from all incumbrances made or done by them or either of them.

[411] *By an indenture, dated the 18th February, 1835, re-

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citing the settlement, Isabella Bell, in consideration of £500 lent to her by Christopher Stalker, appointed (in pursuance of the power contained in the settlement) all the property comprised in the settlement to Stalker, his heirs and assigns, in trust for sale, in case of default, &c., in the same terms as were used in the two preceding indentures, with a proviso, in case of repayment, for reconveyance of the mortgaged premises to the mortgagor, her heirs and assigns, free from all incumbrances made, done, and committed by the mortgagee.

Isabella Bell, by her will, dated the 9th November, 1835, after reciting the indenture of settlement of 5th October, 1816, did, by virtue of the power thereby given to her, and of all other powers &c., devise and bequeath, direct, limit, and appoint, that all the hereditaments and premises comprised in the settlement should, from and immediately after her decease, be and remain and enure to the use of James Wilson and John Coward, their executors, administrators, and assigns' for the term of one thousand years, upon the trusts thereafter mentioned; and subject thereto to the use of all her children equally, to be divided among them as tenants in common, their respective heirs and assigns, for ever, with limitations over, in case of the death of any of such children under the age of twenty-one years and without issue. The trusts of the term were declared to be for raising funds to pay her debts and funeral and testamentary expenses and the maintenance of her children. And the testatrix declared, that, except so far as the several uses, trusts, powers, provisions, and declarations contained in the said indenture of settlement, or any of them, were revoked, altered, or determined by her will or appointment, she thereby confirmed and ratified the same.

By indentures of lease and appointment and release, dated respectively the 14th and 15th February, 1837, and made between the several mortgagees, Isabella Bell and *Thomas Atkinson, reciting the settlement and the previous securities, and that Atkinson had agreed to pay off the several mortgages, amounting to £2500, and to advance a further sum of £1000, it was witnessed, that, in consideration of these sums paid by Atkinson to the mortgagees and Isabella Bell respective- [*412]

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ly, the several mortgages conveyed, and Isabella Bell appointed and confirmed, all the freehold and copyhold property comprised in the settlement to Atkinson and his heirs, upon trust, in the first place, for securing to Atkinson, his heirs, executors, administrators, and assigns, payment from the said Isabella Bell, her heirs, executors, administrators, or assigns, of the sum of £3500 and interest, at the time and in manner therein mentioned, and subject thereto, upon trust for Isabella Bell, her heirs and assigns for ever, freed and discharged of and from all and every the uses trusts, limitations, powers, and provisoes, expressed, declared, and contained in the said indenture of settlement.

Isabella Bell afterwards died, without republishing her will, leaving several children, of whom the defendant James Taylor Bell was her eldest son and heir-at-law.

By the decree made at the hearing of the cause, it was referred to the Master to inquire and state, whether Isabella Bell in any manner, and how, exercised the power of appointment reserved to her under the settlement; and if she did, whether she ever, and when and how, revoked such appointment; and if so, whether she ever subsequently, and how, exercised the power.

The master, by his report, found that Isabella Bell did by the indentures of lease and release of the 18th and 19th February, 1831, and the indenture of the 13th February, 1833, exercise the power of appointment; that she did not afterwards in any manner revoke such appointment, and that she never subsequently exercised the power.

To this finding of the Master an exception was taken by [*413] the defendant James Taylor Bell, to the effect, that "the

Master ought to have found that Isabella Bell did, by the indentures of the 18th and 19th February, 1831, and the 13th February, 1833, and by the indentures of the 14th February, 1834, and the 18th February, 1835, and by her will, exercise the said power of appointment; and that she, by the indenture of release and appointment, bearing date the 15th February, 1837, revoked the said appointment made by her said will, and that she never afterwards exercised the power.

The cause now came on for argument, on the exception, and for further directions.

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Mr. *Wigram* and Mr. *Shapter*, for the exception.—The Master says, that the deeds of 1831 and 1833 operated as an exercise of the power contained in the settlement; that Mrs. Bell did not afterwards exercise it by will or otherwise; that the will was a mere devise out of her interest, and that the deed of 1837 is a mere mortgage. We, on the other hand, submit that all the instruments of mortgage up to that of 1837 left the power in full force; that the deed of 1837 revoked the will, and determined the power; and, consequently, that Isabella Bell became seized in fee of the equity of redemption, which, upon his death, descended on James Taylor Bell, as her heir-at-law.

First, in order to alter the limitations of the settlement, and to carry the estate in a new channel, a deliberate intention on the part of the mortgagor to that effect should appear on the face of the securities. No such intention appears in any of the mortgage instruments prior to that of 1837. They were evidently intended merely as securities for money. The proviso for reconveyance to the mortgagor, "her heirs or assigns," is not strong enough to change the original course of limitation. In *Jackson v. Innes*,^(a) Lord *Redesdale* says, "In a mortgage the mere form of *reservation of the equity of redemption is [*414] not of itself sufficient to alter the previous title. In such a case (where fraud is out of the question) it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title before the mortgage. This is conformable to the principle upon which other cases have been determined. If a lease be made by a tenant for life under a power created by a settlement, and a rent is reserved to the lessor and his heirs, (which is not an unusual blunder,) these words are interpreted by the prior title and applied to such person as under the settlement may be entitled to the estate in remainder, and not to the heir of the lessor, unless he happen to be the remainderman. In all such cases, the words used are to be interpreted according to the title where the instrument is executed. So, where an estate belonging to the wife is mortgaged, and the equity of redemption is reserved to the heirs of the husband,

(a) 1 Bligh, 104; see p. 115.

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there is a resulting trust for the wife and her heirs." These observations are peculiarly applicable to the present case, and are supported by the great mass of authorities: *Ruscombe v. Hare*,^(a) *Cholmondeley v. Clinton*,^(b) *Jenkins v. Quinchant* (third point),^(c) *Reeve v. Hicks*,^(d) *Tyler v. Lake*,^(e) *Sugden Powers*.^(f) The only case opposed to this view of the subject is *Anson v. Lee*,^(g) but that has not been generally approved.

Secondly, the will is revoked by the deed of 1837: *Hodges v. Green*,^(h) *Tickner v. Tickner*,⁽ⁱ⁾ *Rawlins v. Burgis*,^(k) *Kenyon v. Sutton*,^(l) and that deed expressly frees the equity of redemption from the powers and trusts of the settlement.

[*415] *Mr. *Russell* and Mr. *Wilcock*, for two of the younger children of Mrs. Bell.—*Jackson v. Innes* turns upon this, that where the estate is that of the wife, and she enters into a mortgage transaction merely for security, she is not to be considered as having parted with the estate unless upon the deed a clear intention is shown to that purpose. In that case the character and situation of the parties entering into the security was regarded. Probably in *Jenkins v. Quinchant* the estate was that of the wife. In the present case the character in which the party dealt with the property does not affect the question. The whole case depends on the frame of the deeds. In the first indenture, that of 1831, a clear intention is manifested to keep up the uses of the settlement. But the deed of 1833, is utterly inconsistent with it, and shows an intention on the part of Mrs. Bell to destroy the power of appointment. The first trust of that deed is to permit her to receive and take the rents till default shall be made in repayment according to the proviso thereafter mentioned. The proviso is for payment in February, 1834. The fee, therefore, is expressly vested in the trustees till that time. If Mrs. Bell had died a day after the execution of this deed, would not the trustees have been trustees for her heirs? On the other hand, in case of default of payment, there is an express trust for sale; so

(a) 6 Dow, 1.

(b) 2 Mer. 179, n.

(c) 5 Ves. 598; Ambl. 147.

(d) 2 Sim. & S. 403.

(e) 4 Sim. 144; 2 Russ. & M. 183.

(f) Vol. 1, p. 362; 6th ed. (g) 4 Sim. 364.

(h) 4 Russ. 28.

(i) 3 Atk. 742.

(k) 2 Ves. & B. 382.

(l) 2 Ves. jun. 601, cited.

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that in the event the whole settled property (for the deed of 1833 extends to the whole) is absolutely converted. That deed, it may be remarked, contains no words of conveyance, but is an appointment only.

Supposing the deed of 1833 to operate in destruction or exhaustion of the power, the will must be considered simply as a will and not as an appointment. As to the deed of 1837, the general object of it was to consolidate all the pre-existing mortgages. No new purpose was to be effected by it; and therefore there is no ground for considering it as having any operation beyond that of an ordinary mortgage. With [*416] the exception of a few additional words, which the Court will reject without difficulty, the language of this deed is like that of the preceding ones.

Mr. *Anderdon*, Mr. *Kenyon Parker*, Mr. *Stinton*, and Mr. *May* appeared for other parties.

Mr. *Wigram*, in reply.—The general rule is, that an instrument purporting on the face of it to be a mere mortgage is not to operate beyond that, unless a clear intention to that effect be expressed. *Co. Litt.* 208 a. (*Ed. Bull.*) note, 106, *third point*. The case of *Jackson v. Innes* is only an illustration of that rule; it represents no separate class of cases. The relation in which the wife stands to the husband increases the probability in favor of the general rule, but makes no difference in the principle. [*The Vice-Chancellor* referred to *Fitzgerald v. Fauconberge*.(a)] There the circumstances were strongly in favor of an intention to change the destination of the property. Here, the question is, whether the word "heirs" is to have that effect. The burden of proof is on those who assert the affirmative of that proposition. Moreover, the intention of the settlor must be collected from each deed separately. In order to construe one deed the Court cannot look at what was done in relation to another.

July 8th.—THE VICE-CHANCELLOR.—Since the argument in

(a) *Fitzgib.* 207; 6 Bro. P. C. 295.

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this case, I have reconsidered the report and those documents of which I have been furnished with copies.

I cannot help suspecting that if Mrs. Bell could now be asked whether, by executing the deeds of 1833, 1834, 1835, and 1837, or either of them, she meant more, or thought she had [*417] done more, than merely to give securities or *a security for money, she would probably answer in the negative. But, I agree, all these deeds must, upon this record, be interpreted as if she had read and understood every word of them, having regard, however, to those legal and equitable rules of interpretation that are properly to be applied to such instruments.

If Mrs. Bell's execution of the deeds of 1833 and 1834, or one of them exhausted the power which is now under consideration, the Master's report must stand, or at least her will must prevail: it being agreed on all hands that her will binds the property, if, before her execution of it, her power was exhausted, although the will appears to proceed on a different supposition. I use the expression, "or at least her will must prevail," because that is substantially the proposition against which the exception is directed, and because that part of the report to which the exception in term applies, does not mention or refer to the indenture of 14th February, 1834.

I think that the question of the total exhaustion of the power by the deeds of 1833 and 1834, or by one of them, must be treated independently of the deeds of 1835 and 1837, and independently of the will. It must be decided, I conceive, as it would have been, had Mrs. Bell died in the year 1834. In looking at this point I am struck with the marked variation in language between the security of 1831 on one hand, and the deeds of 1833 and 1834, in the latter of which the security of 1831 is mentioned, on the other hand. What I should have thought of the case, had this circumstance not existed, I need not say, if indeed I certainly know. But with this ingredient in it, and with the recollection of the case of *Fitzgerald v. Lord Fauconberge*, I should not be justified in representing myself as convinced, that, in legal and equitable intendment, there is not exhibited upon the deeds of 1833 and 1834, or one of them, a purpose, [*418] on Mrs. Bell's part, beyond that of merely *securing

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money. Had the Master reported himself as finding such a purpose shown upon those deeds or one of them, I should not have felt myself enabled to overrule his opinion,—that opinion putting an interpretation on the instruments in accordance with the usual and ordinary sense and meaning of the language which they contain. Were I to send the matter back to the Master, I cannot doubt that he would so report; and on the whole, though the question is not by any means free from difficulty, I think that the safer and better course, under the circumstances of the present case, is to abide by the actual language of the instruments; and to declare upon the exception, and upon the further directions, that by the deeds of 1833 and 1834, or one of them, the power was fully executed and exhausted, and that the power consequently was not and could not be, after the year 1834, in any manner exercised.

The exception will be, in form, neither overruled nor allowed. Let the deposit be returned, and the costs of all parties of the exception be costs in the cause.

 *RICKARDS V. RICKARDS.

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1843: July 8th.

Testator bequeathed to his wife the interest and dividends of such stock as should be standing in his name at his decease, during her life; and he directed that at her decease one moiety of such stock "subject to and after deducting such premium or sum of money as should be necessary for the renewal of the Crown lease of the leasehold messuages which he purchased of Sir H. T., in case he should not have renewed such lease in his lifetime," should go to his five children. In a subsequent part of the will, he gave to his son G. all his leasehold houses which he purchased of Sir H. T., to hold to his said son and his executors, &c., for the then existing term or terms therein, and "all benefit of renewal aforesaid," for his and their own use and benefit. At the time of the widow's death the lease was subsisting unrenewed:—*Held*, that there was a gift to the son out of the Consols of a sum of money sufficient to effect the renewal of the lease, and that by the "renewal" of the lease was intended a grant at the widow's death of a reversionary lease, to commence at the expiration of the former lease, for the same term, at the same rent, and under the same covenants as were mentioned and comprised in the former lease; or as near thereto as the law by which Crown leases are regulated would allow.

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One who had purchased a Crown lease which had been granted upon payment of a certain fine, and subject to a certain rent, and to the expenditure of a certain sum for repairs during the term, bequeathed the lease to his son, with a direction that at the death of his wife the lease should be renewed for the benefit of the son, and the money necessary for the renewal paid out of a certain sum of stock. By act of Parliament the officers of the Crown are bound to renew Crown leases upon certain terms, depending on the value of the property; and upon the death of the widow they declined to renew the lease for the son, except upon payment of considerably higher sums for fine, rent and repairs:—*Held*, that the son was entitled to receive out of the stock, as at the death of the wife, such sum *by way of fine* as should be necessary for the renewal of the lease, and that in calculating that sum, but not otherwise, the amount required for repairs might be considered.

By the statute 34 Geo. 3, c. 75, the King was empowered to grant leases of tenements belonging to the Crown, which should consist principally of buildings, to any person or persons for any term or estate, so as such term or estate should not exceed ninety-nine years, or three lives, from the date of the lease, or, if made to take effect in reversion, should not exceed, together with the lease in possession, the same period, to be computed from the date of such lease, and so as the rent to be reserved should not be less than two-thirds of such annual sum as should be deemed by the Lord High Treasurer, or the Commissioners of the Treasury, for the time being, a reasonable rent, and so as there were reserved a fine to the amount of the remaining part of such annual sum as aforesaid.

By the stat. 10 Geo. 4, c. 50, by which the land revenues of the Crown were placed under the management of the Commissioners of the Woods and Forests, the preceding act was repealed, but its provisions were, in substance though not in form, re-enacted.

By letters patent under the seal of the Court of Exchequer, *dated the 31st January, 1814, King George the Third, in consideration of a certain fine, demised to Sir Henry Tichborne, his executors, administrators and assigns, certain messuages in Piccadilly and the neighborhood for the term of thirty years from the 5th April, 1815, at a yearly rent of 244*l.* 3*s.* The lease contained a covenant on the part of the lessee, within one year after the commencement of the term thereby granted, to repair several of the messuages, under the inspection

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and to the satisfaction of the Commissioners of the Woods and Forests, and to expend upon them respectively various sums of money, amounting in the whole to about £1,600.

By an indenture of assignment dated the 2nd April, 1823, the demised premises were assigned by the executor of Sir Henry Tichborne to George Rickards, Esq.

The will of George Rickards, dated the 22nd December, 1825, was partly as follows:—"I give and bequeath unto my wife, Eleanor Rickards, the whole interest and dividends of such stock as shall be standing in my name at the time of my decease in Consolidated £3 per Cent. Bank Annuities during her life, or so long as she shall continue my widow; and I direct that at her decease, or on her second marriage, one moiety of such before-mentioned stock, *subject to and after deducting such premium or sum of money as shall be necessary for the renewal of the Crown lease of the leasehold messuages in and about Piccadilly, which I purchased of Sir Henry Tichborne*, in case I shall not have renewed such lease in my lifetime, shall go to and be paid to our five children, in such shares and proportions, and in such manner and at such times as she, my said wife, shall by any deed under her hand and seal, executed in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writings or writing purporting to be or in the nature of her last will and testament, duly executed by her in the presence of and attested by two or more credible witnesses, *direct, limit or appoint; and in [*421] default of any such direction, limitation or appointment, then that the said moiety of the said stock or such part thereof, whereof no such direction, limitation or appointment shall be made as aforesaid shall go and be paid to and amongst such of my said children as shall be then living (and to whom no part of the said stock shall be given, limited or appointed as aforesaid) equally share and share alike, with benefit of survivorship, in manner hereinafter mentioned. And as to the other moiety of my said stock in Consolidated £3 per Cent. Annuities, whereof I have given the interest or dividends unto my said wife during her natural life, and so long as she continues my widow as aforesaid I give and bequeath the same, after the death or upon the

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second marriage of my said wife, unto my said five children (subject as aforesaid) equally share and share alike, with benefit of survivorship, in manner hereinafter also mentioned."

The testator then, after bequeathing certain pecuniary legacies to his daughters, proceeded in these terms:—"And I further give and bequeath to my said son, George Holding Rickards, all my leasehold houses in the parish of St. James, Westminster, aforesaid, which I purchased of Sir Henry Tichborne, Bart., or his representatives, or of which I shall at the time of my decease have obtained a renewed lease or renewed leases from the Crown, to hold the said leasehold houses and premises last mentioned unto my said son George, his executors, administrators and assigns, for the then existing term or terms therein, *and all benefit of renewal, as aforesaid*, for his and their own use and benefit."

The testator died on the 19th November, 1831, without having obtained from the Crown any renewed lease. At the time of his death he was possessed of the sum of £54,000, £3 per Cent. Consols, standing in his name. His widow died in November, 1839, without having married again, and without having [*422] exercised the power of appointment "given to her by the will as to one moiety of the stock, leaving the five children named or referred to in the will surviving her.

Soon after the death of the widow, the plaintiff, George Holding Rickards, applied to the Commissioners of the Woods and Forests for a statement of the terms on which they would grant a renewal of the lease. The answer returned was, that the Commissioners were willing to grant a new Crown lease for a reversionary term of thirty-nine years and a half, to commence from the 5th April, 1845 (when the subsisting lease would expire,) for a fine of £4980, to be forthwith paid to the Crown, and a clear yearly rent of 725*l.* 16*s.*, payable half-yearly: the lessee, within one year from the 5th April, 1845, to put the premises in a good, proper and substantial state of repair, and to expend in such repairs the sum of £1570 at the least. Some expressions were used by the Commissioners, from which it would appear that their reason for extending the term was, that it might correspond with the term for which certain other leasehold property was held by Mr Rickards of the Crown.

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Upon the receipt of this answer, the plaintiff, being advised that he was entitled under the will to a lease for the renewed term at the rent reserved by the letters patent of January, 1821, caused a case to be laid before an actuary for his opinion as to the value of the annual sum of 481*l.* 13*s.* (being the difference between 244*l.* 3*s.* the rent reserved by the letters patent, and 725*l.* 16*s.*, the rent proposed under the new lease) for the reversionary term of thirty-nine years and a half. The value was stated by the actuary to be £8230.

The plaintiff claimed by his bill to be paid out of the £54,000 stock the several sums of £4980, £8230, and £1570.

The other children of the testator, by their answers, contended as follows:—First, that, by the will, the plaintiff *was only entitled to a present term of 30 years operating [*423] as a surrender of the existing term, and not to a reversionary term for 39½ years; consequently, that it was questionable whether he was entitled to claim the whole premium of £4980. Secondly, that he was not entitled to renew at the original rent; and therefore, and considering also that he was not entitled to a reversionary term, the calculation of the actuary was founded on wrong *data*, and the claim for £8230 could not be supported. Thirdly, that the sum of £1570, being in respect of repairs, was a burden properly falling on the tenant, and could not be claimed by the plaintiff as in the nature of an additional fine on renewal. A further point, it will be seen, was raised for the defendants in argument.

It was admitted at the bar, that the state of the law as to the power to grant Crown leases must be taken to be the same when the lease was granted to Sir Henry Tichborne as at present.

Mr. *Teed* and Mr. *Schomberg*, for the plaintiff.—It is not, we believe, denied that, upon the true construction of the testator's will, the plaintiff is, upon some terms, entitled to have a renewal procured for him, and paid for out of the testator's estate. The questions, therefore, will be three: first, from what period the lease is to be granted; secondly, for what period; thirdly, what amount of compensation the plaintiff is entitled to.

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First, admitting that the lease is to be obtained on the decease of the widow, or her second marriage, it nevertheless is to be reversionary. The testator, using the expression "benefit of renewal," must clearly have intended something more than the substitution of a new lease for the lease subsisting at the death or marriage of the widow. Secondly, the period for which the reversionary lease is to be granted is, that which the Commissioners of Woods and Forests may choose. In this and [*424] every other respect, *the testator meant to put the plaintiff in the same position as he himself stood. At all events the plaintiff is entitled to a reversionary lease for the same term as before, namely, thirty years. Thirdly, the stock in question is charged with such "premium or sum of money as shall be necessary" for the renewal. Whether the payment for the renewal is in the shape of fine or rent, or repairs, is immaterial. Whatever sum is necessary for the purchase of the prolonged enjoyment of the leasehold premises, is directed to be paid out of the stock. Even in cases where no particular amount of fine is settled by law, and the tenant for life neglects to renew, a reasonable allowance for renewal is made to the remainderman out of the assets of the tenant for life: *Colegrave v. Manby*, (a) *Bennett v. Colley*. (b) Here the amount of fine is fixed by statute. (c) And that amount, whatever it may be, is charged by the testator upon this stock.

THE VICE-CHANCELLOR said that, in his opinion, the utmost the plaintiff could claim was the value, as at the death of the widow, commensurate in duration and terms with the lease which the testator held. Whether such new lease was to commence at the death of the widow, or at the determination of the subsisting lease, might be a question. The plaintiff might be entitled to less than this or nothing, but not to more.

Mr. *Russell* and Mr. *Rogers*, for two of the children who were executors.—The bequest claimed by the plaintiff is void for uncertainty, not being a substantive gift, but parenthetical only.

If a may says—"out of the £100 which I bequeathed [*425] A., I give B. £50"—this is a good *bequest of the £50

(a) 2 Russ. 238.

(b) 5 Sim. 8; 2 Myl. & K. 225.

(c) See ante, p. 419.

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to B., but A. takes nothing : *Godolph. Orph. Leg.* 282 ; *Bac. Abr. Legacies* (B.) 1 ; *Frederick v. Hall*,^(a) *Dashwood v. Peyton*.^(b) [*The Vice-Chancellor*.—A similar argument was used in *Sandford v. Raikes*.^(c) But in this case we also submit that, from the uncertainty of the subject, there are not sufficient words to give the plaintiff an interest in the stock, or to raise a trust in the stock for him : *Chapman v. Brown*,^(d) *Attorney-General v. Hinxman*,^(e) *Bull v. Kingston*.^(f) It is not certain on the face of the will, nor can it be made certain, except by the caprice of third persons, what is the proper amount of money required for the renewal.

Supposing, however, the Court to be of opinion that the plaintiff is entitled to something, there is no ground for holding him entitled to more than the value of a new lease commensurate in every respect with the former : *Price v. Assheton*.^(g)

Mr. *Wigram* and *Malins*, for the other children, cited upon the construction of the will, *Jones d. Henry v. Hancock*^(h) and *Richardson v. Watson*.⁽ⁱ⁾

Mr. *Teed*, in reply.

THE VICE-CHANCELLOR.—The first question is, whether there is any gift of any subject certain or uncertain. The next is, if there be a gift, whether it is a gift of something certain or ascertainable. Now, the testator having a leasehold estate held under the Crown, of the renewal of which there might be a reasonable expectation upon some terms and within some limits, disposes of whatever £3 per Cent. *Consols he [*426] might have at his death, in favor of the widow during her widowhood, and at her decease or second marriage one moiety of his stock to his five children ; but “ subject to and after deducting such premium or sum of money as shall be necessary for the renewal of the Crown lease of the leasehold messuages in and about Piccadilly I purchased of Sir H. Tichborne, in case I shall not have renewed such lease in my lifetime.” If he does

(a) 1 Ves. jun. 396.

(b) 18 Ves. 27.

(c) 1 Mer. 646.

(d) 6 Ves. 404.

(e) 2 J. & W. 270.

(f) Mer. 314.

(g) 1 Y. & C. 82.

(h) 4 Dow. 145.

(i) 4 B. & Ad. 787.

 1843.—*Rickards v. Rickards.*

not mean a gift by this, what does he mean? You can hardly impute to the testator an intention so absurd as that he would have gone out of his way to have made this narrative, or whatever it may be called, for no purpose, for no assignable reason, and with no object in view. Sir *William Grant*, in a case specifically unlike, but which contains some expressions not inapplicable to the present, I mean the case upon Sir John Chichester's will, said, "When he, who has a right to order that any particular thing shall be done, says in a testamentary disposition, that it is to be done, I know not upon what principle it is, that he is to be understood as speaking not imperatively, but narratively—not as giving a direction, but as stating a position;" and again, "Sir John Chichester, was alike master of all his funds, and might apply them all as he thought fit. Any intention he might at one moment have had as to the means of providing for the price of the house, might have been abandoned the next. But when he was to devise a house not yet paid for, he might have been imposing a burthen instead of conferring a benefit," (as the testator might here, if he had given a lease subject to onerous covenants, those covenants possibly not performed, the liabilities of which might have been thrown upon the legatee of the houses)—"if he had not given an express direction for the payment of the price. Such direction he therefore gives, by declaring that it is to be paid for out of the timber. He could not possibly suppose that the devisee had an antecedent [*427] right to have it so paid for, and therefore it is "impossible to liken this to the cases, where a reference to a right supposed to exist already in another, has been held not to operate as a devise." I must impute to the testator some object in having used these expressions; and reading the will with a view of imputing to him some object, I find that, out of the gift which he makes to his children, he directs the deduction of so much as shall be necessary for the renewal, or, in other words, he directs that out of it the lease shall be renewed with so much money as shall be necessary. If there could be any doubt on the language as it stands there, the expression, "And all benefit of renewal as aforesaid," which I am unable to read except with reference to the preceding direction, would remove that doubt.

That there is here, therefore, a gift to the son out of the £3 per Cent. Consols of a sufficient sum of money to make the renewal, I have not the least doubt. There may, however, be a plain intention to give, and yet the subject of gift may be so uncertain, that the Court cannot act upon it; and it is said, that here there is that degree of uncertainty. That turns upon the meaning of the word "renewal." It is not every new lease that is a renewal of a lease. The word "renewal" is a relative term which of necessity requires to be construed by reference to something else. We here, therefore, gain this point, that he uses a word which must be construed with reference to something else. By reference to what? To the lease that he has at the moment: it can be construed with reference to nothing else. But it is said, that the word "renewal," though referring to the same property, as included in that lease, may not mean the same or a similar species of lease. That, I apprehend, is an accurate interpretation of the word. I take it that the term "renewal" means a renovation,—a restoration of something to a former or original state—a repetition—a beginning again: it may mean each or either of these things, so far as there [*428] any difference between them: it must, however, be a renewal, a renovation, or repetition, or restoration of the same subject, as far as it is possible to restore that subject. A renewal of a lease, where the context does not require any different interpretation to be given to it, must therefore mean the obtaining a lease as near as possible in every practicable circumstance to the existing lease—as if the subject, worn or wearing out, was to begin again.

What the testator here means, therefore, according to the correct interpretation of the word, a departure from which is not required by the context, is in my opinion a new lease, exactly upon the same terms as the other, that is to say, a lease for thirty years more, under the same rent and covenants, so far as the circumstances will permit. He directs this, however, (for it seems agreed on all hands that such is the meaning of the term, and I concur in that construction,)—he directs this to be done at the death or second marriage of his wife; and the question then arises, whether that which is to be done is a renewal by way of

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surrender, that is, a renewal by beginning the subject again before it is terminated, or waiting for its termination. The word may be, and probably is, open to either construction; but it seems to me that the more correct construction is that which makes the renewal commence, not by way of interruption of the currency or existence of the subject while it endures, but *eo instanti* that the subject determines. It is not, however, necessary in this case to rely upon the strict construction of the expression, for the very lease of which the testator is speaking, or of the property included in which he is speaking, seems to me to give the rule; because that, though granted during the existence of the previous lease, was made to wait for its commencement until the expiration of that lease. On these grounds, I think the renewal that the testator here means, is a repetition of the subject, as far as circumstances will allow, commencing from its termination.

[*428] *The next question is, as to the circumstances, if any by which the new or renewed lease is to vary from the former. It must agree in all possible circumstances with the former; but there is one particular in which it may not be possible for that agreement to take place, because the law has prescribed a particular amount of rent; and therefore if the rent were the same, the renewal might be void. The identity, therefore or similarity between the two subjects must be corrected by the state of the law, by the state of things according to which alone the testator could have obtained the renewal, by making it as near the original subject as the rules of law will allow. The language of the will seems to be in substance this,—the value of a grant at the widow's death of a new reversionary lease of the tenements comprised in the lease of 1814, for the term of thirty years from the expiration of that lease, at and under the same or the like rent and covenants as the rent and covenants reserved and contained in the lease of 1814, or as near thereto as the law will allow.

Then the question will be, how is this benefit to be obtained? It appears that the Crown will not, in fact, grant such a lease as to be strictly a renewal. But it is not, therefore, that on the one hand the legatee is to lose the value of the gift: nor, on the other, that the parties entitled to the stock are to pay anything that

 1843.—*Rickards v. Rickards*.

they ought not to pay. It must be referred to the Master, in the language of the will, to inquire what premium or sum of money was necessary for the renewal of the Crown lease at that time, upon the principle that I have stated. In order, however, not to leave the Master in a state of uncertainty as to the opinion of the Court with respect to one part of the case which has been agitated before me, I have no hesitation in saying, that the Master is not to throw upon those who are entitled to the stock the burthen of performing the covenants for repairs, or any analogous covenant. It must be taken into *considera- [*430] tion with others in assessing the amount of the fine, but it is not in any other way to be thrown upon those who are entitled to the stock.

DECLARE that the £3 per cent. Consols, which belonged to the testator at the time of his death, are subject to the payment to the plaintiff of such premium or sum of money as at the decease of the testator's widow was necessary for the renewal of the lease of the 31st January, 1814, being the Crown lease in the will mentioned. Refer it to the Master to ascertain the amount of such premium or sums. By the word "renewal," the Master is to consider as intended, the grant at the widow's death of a new reversionary lease of the tenements comprised in the lease of 1814, for the term of thirty years from the expiration of that lease, at and under the same or the like rent and covenants as the rent and covenants reserved and contained in the lease of 1814, so far as the law would allow, or as near thereto as the law would allow.

DAVIS V. CRIPPS.

1843: June 10th and 14th.

The two executors of a testator, having employed an agent to act for them in the administration of their testator's estate, borrowed money of him on their private account, for which they gave him their separate promissory notes. The agent endorsed these notes over to certain creditors of his own. Upon a bill filed by the executors against the indorsees and the agent, praying for an injunction to restrain two separate actions brought by the indorsees against the plaintiffs respectively on their separate notes:—*Held*, on demurrer, that the bill was not multifarious, the object of it being also to obtain an account of all monies received by the agent in respect of the testator's estate, and to establish an agreement (of which it was alleged that the indorsees had notice) whereby the monies due on the notes were to be set off against the monies so received by the agent.

1843.—*Davis v. Cripps*.

THE bill stated that Thomas Lediard was for many years the attorney and solicitor of William Davis, the testator in the pleadings named ; that the testator had at different times, advanced and lent to Lediard various sums of money, for which he took Lediard's promissory notes ; and that at the time of his death, the testator held four promissory notes of Lediard, the dates and particulars of which were set forth in the bill. That previous to the testator's death, there had been various dealings and transactions between Lediard, and the plaintiffs William and Jasper

Davis, in the course of which Lediard had lent to the [*431] plaintiffs various sums of money, and that, on the footing of such dealings and transactions, the plaintiffs had

become considerably indebted to Lediard at the death of the testator. That the testator made his will, by which after giving certain legacies, he bequeathed the residue of his estate and effects to the plaintiffs absolutely for their own use and benefit, and appointed them his executors. That the testator died on the 5th December, 1840, and that his will was proved by the plaintiffs. That after his decease, the plaintiffs employed Lediard as their attorney, and also as their agent to administer and wind up the affairs of the testator. That, as such agent, Lediard received large sums belonging to the testator's estate, and paid the testator's funeral and testamentary debts and some of the legacies ; but that he never came to any account with the plaintiffs as such agent. That from the death of the testator to the 18th February, 1842, the plaintiffs individually continued their private dealings with Lediard ; and that Lediard, during that time, lent them various sums. That on the 18th February, 1842, the accounts between the plaintiffs and Lediard, both in respect of the plaintiffs individually, and as relating to the testator's estate, were open and unsettled, the plaintiffs being on the former account, considerably indebted to Lediard, and Lediard being, on the latter account, considerably indebted to the plaintiffs ; and that, on the above-mentioned day, an agreement was come to between the parties, with the assent of the unpaid legatees, that Lediard should, out of his own monies, pay the smaller legacies which were unpaid ; that a certain appropriation of the testator's estate should be made for the larger ones ; and that

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what was due and owing from the plaintiffs individually to Lediard, should be set off against what should remain due and owing from him to the plaintiffs as executors and residuary legatees of the testator. That Lediard, in part performance of this agreement, paid some of the legacies. That on the 12th July, 1842, he was duly declared a bankrupt. That, at the [*432] time of the bankruptcy, the accounts between him and the plaintiffs, on the footing of the agreement, remained unsettled; and that, upon taking such accounts, a large balance would be found due to the plaintiffs.

The bill further stated that William Davis, being desirous of ascertaining the state of his individual account with Lediard in respect of their dealings, called upon him for a statement thereof and that, on the 8th June, 1842, Lediard drew out and delivered to him a statement of the loans and advances made by him to the plaintiffs. That it appeared by such statement, which the plaintiff William Davis approved and signed, that the first of such advances was made on the 6th August, 1827, and the last in March, 1842; and that they were severally secured to Lediard by notes of hand of the plaintiff William Davis, bearing various dates between those respective days. (The dates and amounts of the notes were then set out in the bill.) That at the time the plaintiff signed this statement, the several notes of hand were produced and shown to him by Lediard, and that they had not then been indorsed to any persons or person.

The bill further stated that Messrs. Cripps & Co. were the bankers of the plaintiffs as the executors of the testator, and had also been the bankers of Lediard; and that the receipts and payments of Lediard, as agents to the plaintiffs, had been made through their banking-house. That since the bankruptcy of Lediard, Cripps & Co., alleging themselves to be indorsees from Lediard of the notes of hand so given to him by the plaintiff William Davis, had brought an action against him to recover the amount of notes; and they had also, as indorsees of a certain note alleged to have been given by the plaintiff Jasper Davis to Lediard, brought their action against that plaintiff on that note.

The bill charged, that if these notes were ever indorsed

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[*433] *to Cripps & Co. by Lediard, it was without consideration; and that when they were indorsed, Cripps & Co. had full notice of or reason to believe the terms of the agreement of February, 1842, and of Lediard being considerably indebted to the plaintiffs on the balance of all accounts between him and them; and that the notes were indorsed to Cripps & Co. by Lediard, on the eve of and in contemplation of his bankruptcy, and in order to defeat the rights of the plaintiffs under the agreement of the 18th February, 1842.

The bill, which was filed against Cripps & Co., Lediard, and the assignees under Lediard's bankruptcy, prayed that the agreement of the 18th February, 1842, might be declared binding on Lediard: that it might be ascertained, by all necessary and proper accounts, what at the time of Lediard's bankruptcy was due and owing from him to the plaintiffs on account of the testator's assets, and what was due to him from the plaintiffs individually, on account of their private dealings with him; and that what was due and owing on each account respectively might be set off against the other; and that if it should appear that what was due from the plaintiffs exceeded what was due from Lediard, the notes of hand of the plaintiffs, if properly indorsed to Cripps & Co., might stand as a security to them for the balance; but if the contrary should appear, then that the plaintiffs might be at liberty to prove for any balance which might be due to them from the bankrupt's estate; and that the assignees might be directed to set apart a proper portion of the assets of the bankrupt to answer the dividends under such proof; and that the defendants Cripps & Co. might be restrained, by injunction, from prosecuting the said actions on the notes, and from commencing any other actions &c., and for general relief.

The defendants, the bankers, demurred for want of equity and multifariousness. They also, *ore tenus*, demurred for want of parties, the legatees with whose assent the agreement [*434] *of the 18th February was alleged to have been entered into, not being parties to the suit.

Mr. *Russell* and Mr. *Parry*, for the demurrer, said that the objection for multifariousness applied to misjoinder of plaintiffs:

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and here there was such misjoinder, for the matter of two actions was included in one bill. It would probably be said that this objection was cured by the allegation as to the contract of the 18th February, 1842. But it was not alleged that that contract was of a joint nature. *Salvadge v. Hyde*,(a) *Moses v. Lewis*.(b)

Mr. Cooper and Mr. Hislop Clarke, for the bill.

THE VICE-CHANCELLOR said, that, upon the question of parties, he must consider the agreement as one simply between the executors and Lediard. The mere allegation that the legatees assented to the agreement and acquiesced in it did not make them parties to it; and although it appeared that Lediard was a trustee for one of the legatees, yet upon the true construction of the agreement, Lediard must be considered as a party to it solely as a debtor and creditor, and not as a trustee. It was not necessary, therefore, that the legatees should be made parties to the suit,

Upon the question of general equity his Honor was of opinion that the alleged agreement for set-off, the alleged proceedings of the bankers after notice of the agreement, and the probability of complication in the accounts were sufficient to support the bill, even though the matters included in it, or some of them, might possibly be a good defence at law to the actions.

As to the objection for misjoinder, his Honor said that neither of the plaintiffs could file a bill to have *accounts [*435] taken of the testator's estate without making the other a defendant. They were executors; and that circumstance, independently of the other facts of the case, rendered the bill maintainable in its present shape.

 1843: June 10th.

A bill sought to establish a course of dealing between the plaintiffs and L., in which the plaintiffs became indebted to L. on their private account, and he, as agent for the administering the affairs of a testator, became indebted to the plaintiffs, as the testator's executors and residuary legatees; and the bill charged that an agreement having been entered into for a set-off of these respective claims, C. & Co., who

 (a) Jac. 151.

(b) 12 Price, 502.

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were the bankers both of the plaintiffs as executors, and of L., with full knowledge of the agreement and of the accounts being open and unsettled, and that a large sum of money would be coming to the plaintiffs on a balance of all accounts between them and L., became the indorsees of certain promissory notes given by the plaintiffs to L. for securing the sums due from them to him. The bill (which prayed an injunction to restrain proceedings at law on the notes) then contained various minute inquiries as to what dealings and transactions had taken place between L. and the plaintiffs; whether the defendants were not the bankers of both parties, and whether payments on the executorship account were not made through them; whether, by a certain written statement mentioned in the bill, it would not appear that the loans to the plaintiffs were made on certain days during a certain period, or at some other and what times; whether the accounts between the parties were not open and unsettled, or how otherwise; and whether a large sum, or what sum of money was not due from L. to the plaintiffs, or how was the contrary made out. The defendants by their answer denied notice of the agreement, and stated their belief that such alleged agreement never existed. In order to meet the inquiries contained in the bill, and also to assist them in showing that there were no open and unsettled accounts between the parties, or, if there were, that the amount of monies due from the plaintiffs to L. exceeded the amount due to them from him—they set out, in *hæc verba*, in a schedule to their answer, the before-mentioned written statement, all the promissory notes and all the acknowledgments for money given by the plaintiffs to L., and the whole of the banking account of the executors:—*Held*, that the defendants, the bankers, having been expressly called upon to answer in this minute manner as to the accounts between the plaintiffs and L., the schedule to their answer was not impertinent.

The demurrer having been overruled, the defendants put in their answers. The plaintiffs then took exceptions to the answer of the bankers for impertinence in respect of the greater portion of the matter contained in the first part of the schedule to the answer. The exceptions were taken in a form similar to that made use of in *Wagstaff v. Bryan*.^(a)

The Master certified the answer to be impertinent in all the points excepted to, and directed the defendants to pay the plaintiffs the costs of the reference consequent thereon, pursuant to the 22nd general order of the 21st December, 1833.

The defendants, the bankers, then excepted to the Master's certificate, and their exceptions now came on for argument.

[*436] The interrogating part of the bill contained the following inquiries:

(a) 1 Russ. & M. 28; see p. 30.

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4. Whether, previous to the death of the testator, there had not been various, or some, and what private dealings and transactions between the defendant Lediard and the plaintiffs individually; and whether, in the course of such dealings and transactions, Lediard had not advanced and lent various, or some sums of money to the plaintiffs individually; and whether, on the foot of such dealings and transactions, the plaintiffs individually were not considerably, and to what extent respectively, indebted to the defendant Lediard at the death of the testator, or *how otherwise*.

12. Whether the defendants Joseph Cripps, Frederick Cripps, and Raymond Cripps, do not trade under the firm of Messrs. Cripps & Co., or under some other, and what style or name; and whether they were not the bankers of the plaintiffs as the executors of the testator, and whether they were not also the bankers of the said defendant Lediard; and whether the receipts and payments of the said Lediard as such agent as aforesaid, were not made through the banking house of the said defendants Messrs. Cripps & Co., or how otherwise.

16. Whether the plaintiff William Davis, being desirous of ascertaining the state of his individual account with the defendant Lediard in respect of their private dealings and transactions, did not call upon the said defendant for a settlement thereof; and whether, on the 8th day of June, 1842, or at some other and what time, the said defendant did not draw out and deliver to the plaintiff William Davis a statement of the loans and advances made by him, Lediard, to the plaintiff William Davis: and whether, by such statement, it did not appear that the first of such advances was made on the 6th day of August, 1827, or at some other and what time; and whether the last of such advances was made in the month of March, 1842, or at some other and what time, or how otherwise; and *whether [*437] the plaintiff, William Davis, did not examine the said statement and approve of the same; and whether, as evidence of such approbation, he did not sign the said statement, or how otherwise.

20. Whether the defendant Lediard ever, and when, came to any and what settlement of accounts according to the agreement

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of the 18th day of February, 1842; and whether the accounts between the said defendant and the plaintiffs in respect of the said testator's assets, and in respect of the personal dealings and transactions between the said defendant and the plaintiffs individually, or one and which of those accounts, were not open and unsettled at the time of the bankruptcy of the said defendant, and are not now open and unsettled, or how otherwise; and whether a large sum, or what sum of money, was not due and owing from the said defendant Lediard, at the time of his bankruptcy, to the plaintiffs, and is not now due and owing to the plaintiffs, from the estate of the said defendant Thomas Lediard, in respect of the said testator's assets, or how otherwise; and whether such sum of money does not far exceed what is due and owing from both of them to the estate of the defendant Thomas Lediard, in respect of the private dealings and transactions between said defendant and the plaintiffs, or how otherwise; and how is the contrary made out.

25. Whether the defendants Messrs. Cripps & Co. ever, and when, gave any and what valuable, or any and what good consideration, to the defendant Thomas Lediard, for such notes of hand and promissory note as hereinbefore in that behalf mentioned, or for any or either and which of them; and, if so, under what circumstances was such consideration for the said notes of hand and promissory note and for each and every of them given; and of what precise particulars did the consideration for the said notes of hand and promissory note, and for each and every of them, consist. [Then followed inquiries founded on the [*438] charges of *notice, and the indorsing of the bills, on the eve of bankruptcy.]

29. Whether what was coming to the plaintiff William Davis from the defendant Lediard at his bankruptcy, in respect of the plaintiff William Davis's share or part of the assets of the testator in the hands of said defendant Lediard, is not much more, and how much more, in amount than the aggregate of the principal monies and interest secured by, and alleged to be due and owing upon, the said notes of hand of the plaintiff William Davis, or how otherwise; and how do the said defendants make out the contrary.

By the 30th interrogatory, relating to the defendant's posses-

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sion of books, accounts, cheques, receipts, documents, vouchers, papers and writings, by which, as the bill charged, the truth of the several matters therein mentioned would appear, the defendants were required to set forth a list or schedule and short description of such of the aforesaid particulars as were then in their possession, &c.

The defendants Cripps & Co. by their answer stated, following the inquiries in the fourth interrogatory of the bill, that they believed that previous to the death of the testator there had been various private dealings, &c. &c. ; but *save as thereby appeared* the defendants knew not and were unable to set forth, as to their belief or otherwise, *what* private dealings and transactions had so taken place between the defendant Lediard and the plaintiffs individually, or *to what extent* the plaintiffs were respectively indebted to the defendant Lediard at the death of the testator. They admitted, in answer to the twelfth interrogatory, that they did from January, 1837, but not otherwise for many years previous, and up to the month of November, 1841, carry on the trade or business of bankers in copartnership together at Cirencester, under the firm of Messrs. Cripps and Co., and that they were, *to the extent appearing by the account headed "The Executors of William *Davis," set forth in the schedule* [*439] *thereto*, but not further or otherwise, the bankers of the plaintiffs as the executors of the said testator, and that they were also the bankers of the defendant Thomas Lediard ; but, *save as appeared by the last-mentioned account as the same was set forth in the schedule thereto*, the defendants knew not, and were unable to set forth as to their belief or otherwise, whether the receipts and payments of the said Thomas Lediard, as such agent as aforesaid, were made through the banking-house of the defendants.

In answer to the sixteenth interrogatory, they stated that they believed that the plaintiff William Davis and the defendant Lediard came to an examination and settlement of accounts on, or about the 7th and 8th June, 1842, and that on those respective days the plaintiff William Davis signed the respective accounts, *of which true copies were set forth in the schedule thereto* ; and they believed that such respective accounts were true and

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correct accounts, except, &c.: they believed that the defendant Lediard urged the said plaintiff William Davis to come to a settlement of accounts with him, and that the said accounts were signed by the said plaintiff after a full and fair investigation of his dealings and transactions with the said defendant Lediard; but save as aforesaid the defendants were ignorant of the circumstances which led to such accounts being drawn out and signed, or on whose application the same was done, and, save as aforesaid, and as appeared by such accounts *as the same were set forth in the said schedule thereto, and by the notes and memorandums written at the foot thereof respectively*, the defendants knew not, and were unable to set forth as to their belief or otherwise, whether the said plaintiff William Davis, being desirous of ascertaining the state of his individual accounts, &c. [following the words of the sixteenth interrogatory.]

In answer to the twentieth interrogatory, they denied [*440] that the alleged agreement of the 18th February 1842, was ever in fact made or entered into; but if such agreement were made or entered into, they knew not, and were unable to set forth, as to their belief or otherwise, whether the accounts between the said defendant Lediard and the plaintiffs &c. were open and unsettled at the time of the bankruptcy, &c. [following the words of the interrogatory.]

The defendants then proceeded to state that they advanced to Lediard, at interest, £1000 on the 31st March, 1842, on his promissory note of that date, and the further sum of £359 on the 2nd May, 1842, on his promissory note of that date, and that these sums and interest were still due and owing to them, and that they took and received the notes of hand mentioned in the bill and the account of the 8th June, and the vouches evidencing other advances by Lediard to the plaintiffs, in or towards payment of, or for better securing the said sums of £1000, £350, and interest; and, save as aforesaid, they were unable to set forth as to their belief or otherwise, whether they ever, and when, gave any or what valuable consideration, &c. [following the words of the twenty-fifth interrogatory.] They then denied the charges of the bill as to notice, and as to the indorsement to them on the eve of the bankruptcy of Lediard. They then stated that the

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several notes of hand of the plaintiff William Davis, the account of the 8th June, 1842, and the vouchers, were delivered to them by Lediard on the 9th June, 1842, and that all the notes of hand except three were then indorsed by Lediard. They then averred as follows:—And these defendants believe that the said plaintiff William Davis stood justly indebted to the said defendant Thomas Lediard on the 8th June, 1842, in the several sums of money mentioned and comprised in the said account or statement of that date, *set forth in the schedule hereto*, other than and over and above the several advances or sums of money for or in respect of which the said notes of hand were respectively given, in respect of which the said actions have been brought; and *such several other sums are still due from the said [*441] plaintiff William Davis, and these defendants are entitled to receive the same as the assignees or holders of the said account of 8th June, 1842, and of the said vouchers evidencing such last-mentioned advances, such vouchers being written undertakings or acknowledgments signed by said plaintiff William Davis in respect thereof respectively, and which undertakings or acknowledgments, together with the said account of the 8th June, 1842, were delivered to this defendant Raymond Cripps, for himself and these other defendants his copartners, by said defendant Thomas Lediard as aforesaid, on or about 9th June, 1842, and previous to his bankruptcy, and the act upon which it was founded; and save as aforesaid and as herein mentioned, in regard to these defendants being unable to set forth whether the said defendant Thomas Lediard was indebted to said testator, these defendants know not, and are unable to set forth, as to their belief or otherwise, whether what was coming, &c. [following the words of the 27th interrogatory.]

The defendants stated that the book containing the banking account was in daily use for the purpose of winding up their business as partners in a joint stock banking company, and could not be removed without great inconvenience, and they insisted that they were not bound to produce or part with any of the notes or securities mentioned in the schedule to their answer.

The first part of the schedule contained the following matters

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(set forth *in haec verba*.) in respect of which the Master had certified the answer to be impertinent:—

The accounts referred to in the answer to the 16th interrogatory. [See *ante*, p. 439.]

A statement as to which of the items in the accounts were secured by the promissory notes of the plaintiff William Davis, mentioned in the bill, and which, by his written undertakings or acknowledgments, referred to in the answer. [See *ante*, p. 440.]

[*442] *Copies of all the promissory notes of the plaintiff William Davis, and of the promissory note of Jasper Davis, mentioned in the bill, and of all the undertakings and acknowledgments of the defendant William Davis mentioned in the answer.

The banking account referred to in the defendants answer to the 12th interrogatory. [See *ante* p. 438.]

Copies of cheques given by Lediard to the bankers, on the executors' account, in favor of the plaintiff William Davis.

The second part of the schedule (which was not excepted to) contained a list of all the documents in the defendants' possession relating to the matters of the suit.

Mr. *Russell* and Mr. *Parry*, for the exceptions, referred to *Parker v. Fairlie*,^(a) *Lowe v. Williams*^(b) and *Norway v. Rowe*.^(c) [*The Vice-Chancellor* mentioned *White v. Williams*,^(d) and *Christian v. Taylor*.^(e)]

Mr. *Cooper* and Mr. *Hislop Clarke*, in support of the Master's certificate, contended, that the schedule was framed in a prolix and oppressive manner, and that it would have been sufficient to have simply referred to the documents there set out without copying them *verbatim*; *Slack v. Evans*,^(f) *Byde v. Masterman*.^(g)

THE VICE-CHANCELLOR, (after intimating that he would not call for a reply unless, upon a further examination of the papers

(a) 1 S. & S. 295; Turn. & R. 362. (b) 2 S. & S. 574; see 1 Y. & C. 118.

(c) 1 Mer. 347. (d) 8 Ves. 193. (e) 11 Sim. 401. (f) 7 Price, 278, n.

(g) Cr. & Ph. 265.

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in the cause, he should think it necessary.)—I do not say, or intimate, that this case has occupied too long a time in argument, but the length—the proper *length of the argument, obviously gives rise to two remarks: one, that (irregularity being out of the question) it seems difficult to consider that matter prolix or oppressive, which it requires so long a time to argue to be prolix or oppressive: another, that those who originally introduced and established the rule of referring answers for impertinence by reason of a prolix or oppressive schedule, could hardly, in my judgment, contemplate a case which would render such an argument, as that which has just been concluded, necessary.

The Court, in cases of impertinence, ought, before expunging the matter alleged to be impertinent, to be especially clear that it is such as ought to be struck out of the record for this reason, that the error on one side is irremediable, on the other not. If the Court strikes it out of the record, it is gone, and the party may then have no opportunity of placing it there again: whereas if it is left on the record, and is prolix or oppressive, the Court, at the hearing of the cause, has power to set the matter right in point of costs. That consideration has been alluded to by Lord *Eldon* in *Parker v. Fairlie* and other cases. It ought to be clear to demonstration that the matter complained of is impertinent, before that which, if wrong is irremediable, is done.

Here the plaintiffs, being sued at law by the bankers, raise three points. First, they say that the bankers had notice of such arrangement as they, the plaintiffs, made with Lediard; but that the arrangement with Lediard was this—that whereas, Lediard was a debtor to the estate of which the plaintiffs were the legatees, and whereas Lediard was a creditor of the legatees severally on their private accounts, the demands should be set off against each other, and the whole should be blended in one account.

The bill, raising that case does not admit the state of the accounts as far as the bankers are concerned—does not say that the nature of the account is immaterial, but *raises [*444] for the purpose of discovery all the three points:—1st, the quantum of debt due to the plaintiffs from Lediard; 2nd,

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the quantum due to him from the two plaintiffs; 3rd, notice of the agreement. Every one of these points is in issue between the plaintiffs and the bankers for the purpose of discovery; whereas, as to them, the plaintiffs might as to discovery have confined themselves to the agreement and notice of it. They have not done so. They ask a statement as to all items going to the account, and conclude with this prayer: that it may be ascertained by *all necessary and proper accounts* what was due and owing between the parties at the time of Lediard's bankruptcy; and that if it shall appear &c. [His Honor here read the prayer of the bill.] They then ask for general relief; which may possibly be extended to the relief that the documents, or any of them, may be ordered to be delivered up.

Now, I find upon the statements of the bill, that there are six questions which the bankers are called upon to answer, which form the ground work of the present contention. [His Honor here read and commented upon the several interrogatories set out, *ante*, pp. 436, *et seq.* He noticed in the 4th interrogatory, the expression, "some and *what* private dealings and transactions," and the absence of the word "what" in connection with the words "sums of money." He also observed, in reference to that and other interrogatories, that he had never considered the words "how otherwise" to be merely impertinent. He thought that those words ought to have some meaning and operation and that they had some meaning and operation here.

Referring to the 16th and 20th interrogatories, he said that the object of them was, in part, to establish that the accounts were open and unsettled at the time of Lediard's bankruptcy: whereas it was the defendants' case that they were not open or unsettled; the defendants, therefore, were entitled to show upon their answer what was necessary to support that view.

[*445] And with respect to *that part of the interrogatories by which it was inquired whether a large sum of money was not due to the plaintiffs from the bankrupt's estate, and whether it did not far exceed what was due from them to that estate, and *how the contrary was made out*, the defendants had no alternative but submission. His Honor then, after noticing the expression "short description," made use of in the inquiry

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for documents, upon which, however, he said that it was not necessary to give any opinion, proceeded :] Now considering the nature and extent of these inquiries—considering the words of reference in the defendant's answer to the schedule, and the qualification with which they state the knowledge of those circumstances of which they do not state that they have a perfect knowledge—and considering the proceedings at law—my impression is, that if the case of *Parker v. Fairlie* had not existed, I should have thought this schedule not impertinent: but combining all these circumstances with the observations of one of the greatest men who ever sat in the Court of Chancery, I must state it as my opinion, with great deference, however, to the opinion of the learned Master who has taken a different view of the case, that the schedule should be permitted to stand. Unless, therefore, my opinion should undergo any alteration upon a further examination of the pleadings, the exceptions must be allowed and the deposit returned; reserving the question what ought to be done with the costs of the matter alleged to be impertinent.

June 14th.—THE VICE-CHANCELLOR—I have again considered the papers in this case, and I continue of opinion that I ought to allow the exceptions to the report, without prejudice to the question, what, at any future stage of the cause, ought to be done as to the costs occasioned by the matter alleged to be impertinent. It is unnecessary to repeat the observations which I made on the case during the argument *and at [*446] its conclusion. But I may add to them two remarks—the first, that some, though not all, of those interrogatories in the bill which form part of the grounds of my opinion, may be thought to be answered by the defendants, not with a reference to the first part of the schedule, or with a qualification from it, but absolutely. It seems to me, however, that to treat those passages of the answer literally, as if not qualified by the first part of the schedule, would impute to the defendants inaccuracy and incorrectness not intended by them, and would not be consistent with a fair and candid interpretation of the whole answer taken together. † therefore cannot so treat them. Secondly, to adhere to the

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opinion of the learned and experienced Master, from whose judgment I differ with so much distrust of my own, would render the answer insufficient—a circumstance, I agree, very far indeed from conclusive, but, still, whether that was or was not the main object of the reference, (upon which, if I have an opinion, I need not state it,) a circumstance not altogether to be disregarded.

I may farther say, that the Master probably could not make that species of reservation, on the subject of costs, which I have thought it right, following, (though not, in my decision, solely relying on) *Parker v. Fairlie*, to make.

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*BULL V. BIRKBECK.

1843: March 18th. July 1st.

Equitable tenant for life of copyholds, under a will which contained no special provision for the payment of expenses on admission, died without having paid the fines and fees incurred on the admission of a trustee in her lifetime. By her will she bequeathed her personal estate to her daughter for life for her separate use, and after her decease to her children. The daughter and her husband and children took estates in remainder in the copyholds:—*Held*, that having regard to the frame of the will under which the tenant for life was entitled, and to the interest which the parties entitled to the copyhold estates took in the personal estate of the tenant for life, one-third of the fees was properly payable out of the corpus of the personal estate of the tenant for life: the husband of the daughter consenting to pay the residue.

By the will and codicil of Robert Ellis certain freehold and copyhold estates in the county of Norfolk were devised to trustees in trust for the testator's daughter, Elizabeth Hodson, the wife of Thomas Hodson, for life, for her sole and separate use, with remainder to her children and their heirs, in such parts and proportions, manner and form as she should, notwithstanding her coverture, by will appoint. The codicil declared that the receipt or receipts of the testator's daughter, notwithstanding her coverture, should from time to time be a sufficient discharge to the trustees, and any future trustees thereafter by them appoint-

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ed, in and about the execution of the trusts therein contained, and in case either of the trustees thereby appointed, should refuse to act, it should be lawful for the continuing trustee, with the consent of the testator's daughter, to appoint one other trustee to act with him in the trusts &c., and that each trustee should be answerable only for his own separate acts, deeds receipts and disbursements, and should be reimbursed all costs, charges and expenses attending the execution of the trusts therein contained. No special provision was made for the expenses attending the admission, from time to time, of the trustees to the copyholds.

After the death of the testator, Mrs. Hodson received the rents and profits of the testator's real estates to her separate use. She had several children, all of whom, except Elizabeth, died in her lifetime without issue. Elizabeth married, in Mrs. Hodson's lifetime, the Rev. Edward Bull, and had several children.

Mrs. Hodson having, under the wills of her father and mother, powers of appointment over considerable personal estate, and being possessed of a large separate property of her own, by her will appointed and bequeathed all that "property [*448] to Henry Birkbeck and Clement William Unthank, whom she also nominated her executors, in trust for her daughter Elizabeth Bull for her life, for her separate use, and after her decease, for the benefit of her children.

She made no appointment of the real estate, but upon the marriage of Mr. and Mrs. Bull, it was settled upon them for their lives with remainder to their children. She died in November, 1840, leaving Mr. and Mrs. Bull, and their children, all of whom were infants, surviving her.

In the lifetime of Mrs. Hodson, the trusts of the real estates had become vested in Birkbeck and Unthank, the same persons as were named executors and trustees under her will. Mr. Unthank was admitted to the copyholds, and the amount of the sums required for fines, fees, and stamps, on his admission, was £255. That sum was never paid by Mrs. Hodson, and the steward of the manor threatened to bring his action against Unthank to recover the amount.

The present suit having been instituted on behalf of the infant children of Mr. and Mrs. Bull against Mrs. Hodson's execu-

1843.—*Bull v. Birkbeck.*

tors,(a) and against the father and mother of the plaintiffs, for the purpose of having the personal estate of Mrs. Hodson administered and the residue secured, and the usual decree having been made, and various sums of money having been paid by the executors into Court on account of the assets of the testatrix, a petition was presented on the part of Mr. and Mrs. Bull, praying that the before-mentioned sum of £255 might be paid out of the assets of the testatrix, in case the Court should be of opinion that she, as tenant for life of the copyhold, was bound to pay [*449] the whole of that sum; otherwise, that it might be referred to the Master to settle the proportions of that sum which ought respectively to be borne by her estate, and the party entitled to the inheritance.

Mr. *Wigram* (with whom was Mr. *Vesey Dawson*,) the petitioners, referred to *Greenwood v. Evans*.(b)

Mr. *Kenyon Parker* and Mr. *Collyer* for the trustees.

Mr. *Wright* for the plaintiffs.

THE VICE-CHANCELLOR directed a reference to the Master to inquire whether, under the circumstances stated in the petition, it would be fit and proper and for the benefit of the parties interested in the personal estate of the testatrix, Elizabeth Hodson, that any, and (if any) what, part of the copyhold fines and fees, in the petition mentioned, should be paid out of the *corpus* of such personal estate. The Master to be at liberty to state any circumstances relating to such inquiry specially, and to include the result of such inquiry in his general report.

July 1st.—The Master made his report, and thereby stated

(a) Administration was granted to the executors, limited to the residue of the personal estate of Robert Ellis, and the residue of the estate of Mary Ellis, the mother of Mrs. Hodson, and the rents and profits of the real estate of Mrs. Hodson, due at the time of her decease, and also all savings and accumulations arising out of the separate estate and effects, and of which she had a right to dispose.

(b) 4 Beav. 44; see *Playters v. Abbott*, 2 M. & K. 97.

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his opinion to be, that having regard to the question, whether under the will of Robert Ellis the said Elizabeth Hodson, the testatrix, was not bound to pay the whole of the copyhold fines and fees in the petition mentioned, or assuming that upon the true construction of the said will it should be held that she was not bound to pay the whole thereof, then having regard to the interest which the parties who were entitled to the said copyhold estates took in the personal estate of the said testatrix, and to the difficulties in *ascertaining in what pro- [*450] portion and by whom the said copyhold fines and fees were properly payable, it would be fit and proper and for the benefit of the parties interested in the personal estate of the said testatrix, that one-third part of the said copyhold fines and fees should be paid out of the *corpus* of such personal estate, the said Edward Bull having undertaken to pay the remaining two-third parts thereof.

Upon the cause coming on for hearing for further directions,

THE VICE-CHANCELLOR inquired whether the personal attention of the Master had been called to the question as to the copyholds?

Upon being assured that such was the case, his Honor decreed in conformity with the report, that one-third of the sum of £255 due for fines and fees on admission to the copyholds should be raised by sale of a sufficient part of the consols standing to the credit of this cause, and be paid to the defendants, the trustees, the defendant Edward Bull consenting to pay the other two-thirds; the sum so paid to be applied in payment of such fines and fees.

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*DAVENPORT V. BISHOPP.

1843: July 7th and 10th.

In a settlement made in contemplation of a marriage between A. and B., they covenanted with each other and with the trustees, that if B., the intended wife, should during the coverture become seised or possessed of or entitled to any property, real or personal, by any devise, gift, or bequest in her favor, or otherwise, such property should, within six months after she should become so seised or possessed thereof or entitled thereto, be conveyed and assured to such uses, intents, and purposes as B. should appoint, and in default of appointment to B. for life, with remainder to A. for life, with remainder to the children of B.; and if there should be no children or child of B. living at the death of the survivor of A. and B., then to the use of M. L., the niece of B., her heirs, executors, administrators and assigns. The marriage took effect, and during the coverture, real property descended on B., which was not settled in pursuance of the covenant. Some years afterwards, B. died, without issue, and without having made any appointment, leaving C. her heir-at-law. In a suit instituted by A. against C., and the trustees of the settlement, to enforce the performance of the covenant:—*Held*, that in order to satisfy the terms of the marriage contract, the covenant must be carried into execution *in toto*; and therefore not only that the limitation to A. for his life, but that the ultimate limitation to M. L., though a stranger to the settlement, must take effect.[1]

If two parties, for valuable consideration, enter into a contract of which one of the stipulations is solely for the benefit of a third person, who is a stranger to the contract, and from whom no consideration moves, it is not competent to either of the contracting parties afterwards to object to that stipulation.

By an indenture dated the 22nd December, 1818, and made between Eleanora Roberts of the first part, Samuel Davenport of the second part, and E. T. Beynon and Thomas Bishopp of the third part, reciting that Eleanora Roberts was under the will of her father seized of a manor and certain other real estate for her life, and was under the will of her uncle, Francis Cheselden, entitled to one moiety of his residuary personal estate expectant on the decease of her uncle Nedham Cheselden, the value of which moiety was estimated at £4000, and was also possessed of other personal estate, and was in expectation of becoming entitled to or possessed of other property, real or personal, or both; and reciting an intended marriage between Eleanora Roberts and Samuel Davenport, and that upon the treaty for such mar-

[1] See *Davenport v. Bishopp*, 1 Phil. 698.

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riage it had been agreed that the said real and personal property, should be settled as thereafter mentioned; and further reciting that it had been also agreed upon the said treaty by and between the said Eleanora Roberts and Samuel Davenport that if any other property, real or personal, should at any time or times thereafter be left or given to the said Eleanora Roberts, or should descend or come to her by heirship, distribution or otherwise, the same should, according to *the nature thereof, be settled [*452] and vested in trustees in such manner as thereafter mentioned in that behalf; It was witnessed &c. Then followed a conveyance of the real estate to the trustees upon trust for the separate use of the intended wife during her life, and an assignment of the personalty upon trust for the intended husband and wife for their lives, and afterwards for the children of the marriage. If there should be no children, the sum of £2000, part of the said sum of £4000, was to be transferred to the husband or his representatives; the residue to the wife, if she survived her husband, if not, according to her appointment; and in default of appointment, to such person or persons as at the time of her death would have been her next of kin if she had died sole and without having been married.

The settlement then after various usual clauses contained the following: And it is hereby declared and agreed by and between the said Eleanora Roberts and Samuel Davenport, and each of them the said Eleanora Roberts and Samuel Davenport, doth hereby for herself and himself, and her and his heirs, executors and administrators, covenant, declare, and agree, with and to the said E. T. Beynon and Thomas Bishopp, their heirs, executors, and administrators, that if the said marriage shall take effect, and the said Eleanora Roberts shall at any time or times hereafter, during the said intended coverture between her and the said Samuel Davenport, become seized, or possessed of, or entitled to, any property, either real or personal by any devise, gift, or bequest in her favor or otherwise, such property shall, within six months after she shall become so seized or possessed thereof or entitled thereto respectively, be granted, conveyed, assigned and released or otherwise assured to the said E. T. Benyon and Thomas Bishopp, their heirs, executors, administrators and as-

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signs, according to the nature and tenure thereof respectively, or unto such other person or persons, his or their executors, [*453] administrators and assigns, as the said Eleanora Roberts shall appoint, so and in such sort, manner, and form, as that the same, respectively, shall be limited to such uses, intents and purposes, as she the said Eleanora Roberts (notwithstanding her said intended coverture) shall by deed or will direct, limit, appoint, give, devise or bequeath the same: and for want of, and until, such direction, limitation, appointment, gift, devise, or bequest, to the use of the said Eleanora Roberts and her assigns, for her life, for her own sole, separate and peculiar use and benefit, independent of her husband, and not to be subject to his debts or control, and that her receipt alone, notwithstanding her said intended coverture, shall be a sufficient discharge for the rents, issues, profits, dividends, and proceeds of such property, respectively, in the usual manner in such cases; and from and after the decease of the said Eleanora Roberts, to the use of the said Samuel Davenport and his assigns for his life, and from and immediately after his decease, to the use of all and every the children of the said Eleanora Roberts and their respective heirs, executors, administrators and assigns, in equal shares (if more than one,) as tenants in common, and not as joint-tenants, and, if only one such child, to the use of that child wholly, his or her heirs, executors, administrators and assigns: but if there shall be no such child or children, or descendant of any such child or children, living at the decease of the survivor of them the said Eleanora Roberts and Samuel Davenport, then to the use of her niece Mary Jane Weltden Lucas, her heirs, executors, administrators and assigns for ever.

The marriage took effect soon after the date of the settlement.

Mary Jane Weltden Lucas, named in the settlement, was the only child of Mary Jane Weltden Lucas, afterwards Mary Jane Weltden Bishopp, the sister of Mrs. Davenport. She died in 1823, unmarried.

Nedham Cheselden, the uncle of Mrs. Bishopp and [*454] Mrs. *Davenport, by his will, dated the 9th April, 1818, gave and devised all his real estates unto the Rev. S. W. Pochin, his heirs and assigns, to hold the same to the use of

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his (the testator's) wife Jane Chelsden (since deceased) for her life, with remainder to the use of his niece Mary Jane Weltden Bishopp and her assigns for her life, remainder to the use of Mary Jane Weltden Lucas, daughter of the said Mrs. Bishopp by her former husband, and her assigns for her life, with remainder to the use of the said W. Pochin and his heirs during the life of the said Mary Jane Weltden Lucas, in trust to support the contingent remainders, with remainder to the use of his the testator's own right heirs for ever.

At the death of Nedham Cheselden, who died without ever having had issue, Mrs. Bishopp and Mrs. Davenport were his co-heiresses at law.

Mrs. Davenport died in 1839, without issue, and without having exercised any power of appointment under the settlement, leaving Mrs. Bishopp her sole heiress-at-law.

The bill was filed by Samuel Davenport against Mrs. Bishopp, E. T. Benyon, who was the surviving trustee of the settlement, and the heirs of Mary Jane Weltden Lucas; and it prayed that the defendant Mrs. Bishopp, as the sole heiress-at-law of Mrs. Davenport, might be decreed specifically to perform the covenant of Mrs. Davenport contained in the settlement, and to convey the estates devised by the will of Nedham Cheselden, so as to vest one moiety thereof, subject to Mrs. Bishopp's life interest therein, in the surviving trustee of the settlement, to the uses expressed in the covenant. The bill also prayed relief in respect of one moiety of the personal estate of Francis Cheselden.^(a)

The defendant E. T. Benyon having died after the *commencement of the suit, it was revived against the [*455] devisees of his trust estates.

The cause now came on for hearing.

Mr. *Russell* and Mr. *Randell*, for the plaintiffs.

Mr. *Cooper* and Mr. *Metcalf*, for the defendant Mrs. Bishopp.
—We concede that the plaintiff is entitled to a life estate in the lands in question; but we submit that the heirs-at-law of Miss

(a) As to this, see post, p. 463.

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Lucas, being mere volunteers, take no interest. In order to support limitations in marriage settlements in favor of collaterals, there must be a stipulation on the part of the father of the settlor, raising a consideration in their behalf. In most of the cases, the father, having an interest in the land and being a party to the settlement, has stipulated in favor of his younger children or grandchildren; and on that ground the limitations to those parties have been supported: *Vernon v. Vernon*,^(a) *Osgood v. Strode*,^(b) *Stephens v. Trueman*,^(c) *Goring v. Nash*.^(d) But the marriage consideration alone will not support limitations to collaterals. In *Sutton v. Chetwynd*,^(e) it was held, that a covenant in marriage articles in favor of a mere stranger could not be supported. The same rule must apply to a covenant in favor of a remote collateral. In *Clayton v. Lord Wilton*,^(f) a limitation in favor of such a party was supported; but merely as standing between two valid limitations. In *Johnson v. Legard*,^(g) Lord Eldon considered the limitations in favor of the brothers of the settlor to be merely voluntary; and the case of *Cotterall v. Homer*^(h) supports that view.

[*456] Then, supposing the covenant in favor of Miss Lucas to have been merely voluntary, or founded merely on a meritorious and not a valuable consideration, this Court will not carry it into execution; *Dillon v. Coppin*,⁽ⁱ⁾ *Jefferys v. Jefferys*,^(j) *Holloway v. Headington*,^(k) which cases may be considered as overruling the doctrine, though not the decision, in *Ellis v. Nimmo*.^(l)

Mr. *Swanston* and Mr. *Amphlett*, for the heirs-at-law of Mary Jane Weltden Lucas.—First assume these defendants to be volunteers. There is no case in which the right of collateral relations has been defeated as between them and other volunteers. In *Hale v. Lambe*,^(m) Lord Northington said that the consideration of marriage runs through all the limitations of the settle-

^(a) 2 P. W. 594.^(b) Id. 245.^(c) 1 Vez sen. 73.^(d) 3 Atk. 186.^(e) 3 Mer. 249.^(f) 6 M. & S. 67, n^(g) Turn. R. & 281; see p. 293.^(h) 7 Jurist, 544.⁽ⁱ⁾ 4 Myl. & C. 647.^(j) Cr. & Ph. 138.^(k) 8 Sim. 324.^(l) Rep. t. Subd. 333.^(m) 2 Eden, 292.

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ment ; and, but for the intervention of a common recovery, his Lordship would have supported a limitation in favor of a grandson of the uncle of the settlor. In *Sutton v. Chetwynd* all that Sir William Grant decided was this—that not every limitation in a marriage settlement is protected and rendered valuable by the consideration of marriage. In the House of Lords, that case seems to have been argued on a different point, namely, whether Sir William Pulteney, the father of Lady Bath, was not a purchaser for the benefit of Sir Richard Sutton.(a) It may be remarked that Sir Richard Sutton *was not al- [*457] luded to by the articles, and that the volunteer, who claimed under him, was plaintiff in the suit. In the present case we do not call the court into activity. We come in under

(a) See Turn. & R. 296; and H. L. Appeal Cases, Vol. 25, Part 4, p. 558. The following were the printed reasons for the appellant:—

1. Because Sir W. Pulteney and his daughter, Lady Bath, had each of them an interest in the estates comprised in the said articles of settlement, and he relinquished his interest in consideration of the settlement agreed to be made by her; and his relinquishment was a consideration sufficient to support all the limitations in the articles. This was evidently the intention of Sir W. P., in order that the copyhold estate in question should be settled so as to go according to the limitations in the will of Mrs. Frances Pulteney, under which the principal part of the estates comprised in the articles had come to himself and his daughter.

2. Because this is a case of articles made in consideration of marriage, where no creditor or purchaser for a valuable consideration is concerned in resisting the performance.—The Countess of Bath did, by her will, recite the articles in question, and (though no settlement pursuant to them was ever made) appointed her personal estate, as in pursuance and execution of the power covenanted to be reserved to her, to persons, who were mere volunteers; and the Court of Chancery, on a bill filed by one of those appointees against the personal representatives of Sir James Pulteney, who survived his wife, the said Countess of Bath, decreed that these appointees were entitled. It would be difficult to distinguish the cases.

3. Because, if the articles had been performed by equity in the lifetime of the Countess and her husband, they must have been executed *in toto*.

4. Because the appellant has a right to bring an action for breach of covenant in the names of the trustees of the articles and equity to prevent circuitry of action, will perform the articles in specie.

The printed reason for the respondents was in these terms:—

Because the appellant, not being within the consideration of the aforesaid articles for a settlement made upon the marriage of the Countess of Bath, has no right to call upon a court of equity for a specific performance of these articles against her heirs.

The decision in the Court below was affirmed.

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the shadow of the plaintiff. The question here is, (and that is sufficient to distinguish this case from *Sutton v. Chetwynd*,) who has the most equity, the plaintiff claiming under a solemn covenant made upon his marriage, or those claiming under the wife, who seek to defeat that equity? If the plaintiff has any equity to have the articles executed in his favor, they must be executed *in toto*. Even in *Sutton v. Chetwynd* it seems clear that if the articles had been performed by a court of equity in the lifetime of the countess and her husband, they must have been wholly executed. In *Goring v. Nash*, Lord *Hardwicke* felt the difficulty as to a partial execution of the articles. *Newstead v. Seales*.(a)

But, secondly, the defendants are not in reality volunteers. [*458] The question is, not so much whether Miss

Lucas, by virtue of relationship to the wife, was within the marriage consideration, as whether she was within the contract of the parties. It is a question of fact whether the particular limitation was part of the marriage contract. Is there any reason to suppose that a benefit to Miss Lucas was not contemplated by the parties—that it did not expressly form part of their stipulations? Her relationship is at least fair presumptive evidence that it did. In *Vernon v. Vernon*, the limitation to the brothers of the settlor were supported on the ground that the settlor by the act of joining in the settlement became purchaser for them. *Holford v. Holford*.(a) In *Johnson v. Legard*, where the limitation to the brothers and sisters of the husband were considered merely voluntary, it was a settlement of the husband's own land; and the Court must have thought that the wife was hardly interested in that matter. On the other hand, in *Clayton v. Lord Wilton*, the wife might well have consented that her daughters should be postponed to the sons of a second marriage, though not to a stranger. In the decision of these two cases it was probably thought that circumstances did not exist in the one, and did exist in the other, sufficient to bring the party within the marriage contract.

Lastly, as this is a contract under seal, it is not necessary to

(a) 1 Atk. 265.

(b) 1 Ch. Ca. 216.

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resort to the doctrine in *Ellis v. Nimmo*. The right of the trustees to bring an action on the covenant, gives the Court ground for decreeing the specific performance of it: *Vernon v. Vernon*, *Stephens v. Trueman*, *Beard v. Nutthall*,^(a) *Williamson v. Codrington*,^(b) *Colman v. Sarrel*.^(c)

Mr. *Tillotson* appeared for other parties.

Mr. *Russell* in reply.

*THE VICE-CHANCELLOR.—The bill in this case is [*459] filed by Mr. Davenport, for the execution of the trusts of the settlement made in contemplation of his marriage with Miss Eleanora Roberts, afterwards his wife. Part of the relief asked being the specific performance of a covenant contained in the deed as to property, that she might acquire during the coverture, it was with reference to this covenant that my judgment was reserved.

The settlement—an indenture, dated the 22nd December, 1818, was thus :—[His Honor here stated the material parts of the settlement.]

Some years after the marriage, Mrs. Davenport died without issue, and without having had a child, as I collect; and also without having exercised any power given to her by the settlement.

During her coverture there descended upon herself and the defendant, Mrs. Bishopp, as co-parceners, the reversion in fee expectant on the death of Mrs. Bishopp, in certain freehold estates. Though Mrs. Davenport's share in this reversion is admitted to have been, or has scarcely been argued not to have been, and I think certainly was, affected by the covenant for settling future property, and, though the descent took place some years before her death, no settlement or conveyance was ever made of it, and it consequently descended legally at her death on Mrs. Bishopp, as Mrs. Davenport's sole heiress-at-law.

Mrs. Bishopp, admitting that, if the covenant bound this property, Mr. Davenport is entitled to have it settled upon him for

(a) 1 Vern. 427. (b) 1 Vez sen. 511. (c) 3 Bro. C. C. 12; 1 Ves. jun. 50.

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life, (subject of course to her life-interest,) yet contends, that the heirs of Miss Lucas, the niece, can, as Miss Lucas was, as it is said, a volunteer, claim nothing, and that the covenant is, in effect, to have no operation beyond Mr. Davenport's life interest; while the heirs of Miss Lucas, on their side, claim the full performance of the covenant. This is the question of which I am now to dispose.

It may be observed that Mr. Nedham Cheselden, the ancestor from whom this reversion descended on the two [*460] ladies, having died much more than six months before the decease of Mrs. Davenport, the covenant with the trustees was consequently broken in her lifetime; and that, whether Mrs. Bishopp, who, as the heiress of Mrs. Davenport, has legally assets by descent, is or is not liable to be sued at law upon the covenant, that is, whether the covenant with the trustees is joint and several, or joint, or several, Mr. Davenport, I apprehend is certainly so liable; nor, as far as I am aware, is there any equity to restrain the surviving trustee of the settlement, or his representative, from proceeding at law, either against Mr. Davenport or the heiress of Mrs. Davenport, for the benefit of Miss Lucas's heirs, upon the covenant as long as the covenant remains not fully performed.

The surviving trustee of the settlement, or his representative, may be thought to be a trustee of the covenant for the benefit both of Mr. Davenport and of the heirs of Miss Lucas. If, without giving Mr. Davenport, to the extent of his life interest, the benefit of the covenant in this suit, I were to allow the covenant to be made the subject of an action, or of actions, I conceive that the damages recoverable would be upon an estimate of the value of his interest and theirs also. Could it be right to give him relief in equity, by way of specific performance, as to his life interest, which I think the Court bound to do, and leave an action or actions to be brought as to the interest only of Miss Lucas's heirs? It seems to me not.

These considerations, however, which appear to deserve attention, are not all. I apprehend that if two parties, in contemplation of a marriage intended, and afterwards had between them, or for any other consideration between themselves coming

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under the description of "valuable," have entered into a contract together, in which one of the stipulations made by them is a stipulation solely and merely for the benefit of a third person, that third person being even a stranger in blood to each, a stranger to the contract, and a person from whom not any valuable or meritorious *consideration moves, has [461] moved, or is to move, it cannot, generally speaking, be competent to one party to the contract, or to those representing that party in estate, to say to the other party to the contract, "whatever may be your wishes, whether you assent or dissent, that stipulation shall go for nothing, or shall not have effect given to it." The two parties to the contract having made the stipulation with each other, mutual assent must generally be requisite to dissolve that which by mutual assent was created. With the question between them, the gratuitousness of the provision towards the stranger, as far as the stranger is concerned, seems generally to have little or nothing to do.

In the present case, the settlement was the joint act of Mr. and Mrs. Davenport: the covenant is between themselves as well as with the trustees; and not only does it not appear that either he or she ever dissented from the full performance of the covenant, or objected to it, but Mr. Davenport's bill in the cause, and the argument of his counsel at the bar demand its unrestricted fulfilment.

Again, I am struck by the circumstance that the covenant, which, by the way, extends to all Mrs. Davenport's children—not merely to her children by Mr. Davenport—comprises personal as well as real estate. If the covenant is to fail, except as to Mr. Davenport's life estate, there being no issue of Mrs. Davenport, the personal estate, if any, expressed to be affected by it, must, I suppose, belong to Mr. Davenport as his wife's administrator, or as entitled to be so. That could hardly be right. But is the covenant to have one operation as to freehold and another as to personal property? That would scarcely seem proper. If the ultimate limitation, instead of being in Miss Lucas's favor had been in favor of the person or persons who, at the decease of the survivor of Mr. and Mrs. Davenport, should answer the description of her heir-at law or next of kin, would

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not that have been effectual? Mrs. Bishopp's counsel have thought it prudent to avoid admitting that it would, and [*462] they probably would not have deemed it "safe to admit, if Mrs. Davenport, after her marriage, and in the lifetime of Mr. Nedham Cheselden, had executed her power of appointment over this property voluntarily, that is, without valuable consideration, by deed, the validity or efficacy of such a disposition. On the whole, it appears to me that, as a settlement of this reversion, made in Mrs. Davenport's lifetime, if one had then been made, must have been conformable to the covenant (including, of course, her unexercised power;) so, under the circumstances of the case, it ought now to be made in the same manner.

It has not been argued that the circumstance of Miss Lucas's death, which happened after the marriage, having happened in the lifetime of Mr. N. Cheselden, is material.

Upon *Johnson v. Legard*, *Sutton v. Chetwynd*, *Ellis v. Nimmo*, and a recent case of *Doe v. Rolfe*,^(a) it is not necessary, if it would be proper, for me to express any opinion. My present decision, not resting upon either of those cases, may, I apprehend, well stand consistently with each of them. I may, perhaps, however, be allowed to say of *Sutton v. Chetwynd*, the settlement in question in which case is not fully stated in Mr. *Merrivale's* Report, that, had the plaintiff there not been Sir R. Sutton (whose position has been argued to be analogous to that of Miss Lucas,) but had the plaintiff been a contracting party, or the representative of a contracting party, to the settlement, the result might possibly have been different. "It is generally true," as was said by Lord *Langdale* in *Colgear v. Lady Mulgrave*,^(b) "that when two persons, for valuable consideration between themselves covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the two, although each one might as against the other."

In thanking the bar for their arguments in this cause, I ought particularly to mention that of Mr. *Amphlett*.

(a) 8 Ad. & Ell. 650.

(b) 2 Keen, 98.

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Testator bequeathed the residue of his personal estate after the decease of his wife upon trust, to pay the interest and proceeds thereof to N. for life; and after his decease, the testator bequeathed the said trust-money unto all the children of the said N., in equal shares; and, in case N. should die without leaving lawful issue, the testator gave and bequeathed the said trust-money unto his, the testator's, nieces M. and E., to be equally divided between them, share and share alike; if either of his said nieces should depart this life without issue, then he gave and bequeathed the part or share of her so dying to the survivor of them:—*Held*, that the words "depart this life" meant "depart this life in the lifetime of either of the preceding tenants for life;" consequently, that E., having survived the tenants for life, took an absolute interest in one moiety of the residue, though she died without issue in the lifetime of M.

*Another question in this cause arose upon the construction of the will of Francis Cheselden. [*463]

By his will, dated the 25th March, 1815, Francis Cheselden gave and bequeathed the residue of his personal estate, after the decease of his wife, upon trust to pay the interest and proceeds thereof to Nedham Cheselden for his life; and, after his decease, the testator bequeathed the said trust-money or property unto all the children of the said Nedham Cheselden, in equal shares, as he should by deed or will bequeath or appoint the same; and in case the said Nedham Cheselden should die without leaving lawful issue, the testator gave and bequeathed the said trust-money or property unto his, the testator's, nieces, Mary Jane Wellden Lucas (afterwards Bishopp,) and Eleanora Roberts, (afterwards Davenport,) daughters of his sister, Mary Roberts, to be equally divided between them, share and share alike; and if either of his said nieces should depart this life without issue, then he gave and bequeathed the part or share of her so dying to the survivor of them; but if either of them should depart this life, leaving a child or children, then the said testator declared his will to be, that such issue should be entitled to his, her, or their parent's share.

The moiety of Francis Cheselden's residuary personal estate, to which, under the foregoing will Mrs. Davenport was contingently entitled, was comprehended in her marriage settlement in the manner before mentioned.(a) Accordingly, upon the death of Nedham Cheselden, who never had any issue, the sum of

(a) See *ante*, p. 451.

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4368*l.* 11*s.* 5*d.* Consols, which constituted nearly one moiety of Francis Cheselden's residuary personal estate, was transferred to the trustees of that settlement.

[*464] *Upon the death of Mrs. Davenport, her husband, the plaintiff, claimed to be paid the sum of £2000, mentioned in the settlement, out of the 4368*l.* 11*s.* 5*d.* Consols, and to receive the dividends on the residue of that stock for his life; insisting that, according to the true construction of Francis Cheselden's will, one moiety of his residuary personal estate, upon the death of Nedham Cheselden without children, vested absolutely in Mrs. Davenport, and became subject to the trusts of the settlement. Mrs. Bishopp, on the other hand, claimed to be absolutely entitled to that moiety, upon the death of her sister without issue.

Mr. *Russell*, for the plaintiff, observed, that the words "if either of my said nieces shall depart this life" meant "if either &c. shall depart this life before she comes into possession." An absolute interest was given to the nieces in the first instance. The gift over, therefore, was only substitutionary, in the event of either dying in the lifetime of the tenant for life. *Montagu v. Nucella*.(a) [*The Vice-Chancellor* referred to *Lord Douglas v. Chalmer*.(b)]

The point was not pressed on the other side.

THE VICE-CHANCELLOR.—My impression upon this will, having regard to all the expressions contained in it, is, that the words "if either of my said nieces shall depart this life" mean, "if either of my said nieces shall depart this life, living either of the former tenants for life." Neither of the events here contemplated occurred, and therefore the interest will be governed by the settlement.

(a) 1 Russ. 165.

(b) 2 Ves. jun. 501.

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*MAIR V. QUILTER.

[*465]

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Testatrix bequeathed a sum of stock to trustees, upon trust to pay the dividends thereof to her grand-daughter for life, and after her decease in trust to assign, transfer, and dispose of the capital unto and among the children of her said grand-daughter, share and share alike, at their ages of twenty-one, or sooner if the trustees should think proper; and in case the said grand-daughter should die without leaving any child or children, or, leaving such, all of them should die before they or any of them should become entitled to the trust-mones, then in trust to assign and transfer the capital to A. The will contained no clause of survivorship among the children. The grand-daughter had eleven children, of whom seven died in her lifetime, two only out of the seven having attained twenty-one. The four survivors attained twenty-one:—*Held*, that the six children who attained twenty-one took vested interests in the stock, and that, upon the death of their mother, the whole stock was divisible amongst them or their representatives, in six equal shares.

THE will of Mary Frances Baronneau was partly in these terms:—I give and bequeath to my son, Francis Baronneau, and Matthew Chalie, their executors, administrators, and assigns, the capital sum of £5000, £4 per Cent. Consolidated Bank Annuities, upon trust, nevertheless, and to and for the several intents and purposes hereinafter mentioned, (that is to say,) as to the sum of £2500, being one moiety thereof, in trust to pay, apply and dispose of the interest, dividends, and annual proceeds of the said £2500 Bank Annuities to my grand-daughter Frances Helena Baronneau, for the term of her natural life, to and for her sole and separate use and benefit, and not to be subject or liable to the debts, control, or engagements of any husband with whom she may intermarry, but to be paid into her own proper hands, and her receipt alone from time to time, notwithstanding her coverture, to be a sufficient discharge to the said trustees for the same; and from and after the decease of my said grand-daughter, then in trust to assign, transfer, pay, apply, and dispose of the said capital sum of £2500 Bank Annuities, and the interest and dividends to accrue due in respect thereof after the death of my said grand-daughter, unto and among all and every the child and children of my said grand-daughter, or for their preferment or advancement in life, if more than one, equally

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share and share alike, and, if but one, to such only child, at their or his age or ages of twenty-one years, being a son or sons, and being a daughter or daughters, at such age or day or days of marriage, which shall first happen, or sooner if the said trustees shall think proper, and for their advantage. And in case [*466] my said grand-daughter shall happen *to die without leaving any child or children, or, leaving such, all of them shall die before they or any of them shall become entitled to the said trust-monies, then in trust to assign, transfer, and pay one equal moiety, or equal half part of the said sum of £2500, and the interest and dividends thereof then unapplied, unto the said Francis Baronneau, his executors, administrators, or assigns, to and for his and their own use and benefit; and as to the sum of £2500, residue of the said sum of £5000 Consols, and also as to the remaining or other moiety of the said first mentioned sum of £2500 Bank Annuities, from and after the death of my said grand-daughter Frances Baronneau, and failure of children by her, in trust, &c. [Then followed certain trusts in favor of the testatrix's grand-daughter, Mary Ann Mackenzie.] And the testatrix devised and bequeathed all the residue of her estate, whether real or personal, unto her said son, Francis Baronneau, his heirs, executors, and administrators, and appointed him and Matthew Charlie executors of her will.

The will of the testatrix was duly proved by the executors. In 1812, Francis Baronneau died, having by his will bequeathed all his residuary personal estate to his wife, Elizabeth Baronneau, who, at the institution of this suit, was his sole personal representative.

Frances Helena Baronneau married Colonel Alexander Mair, and had by him eleven children, of whom four only survived their parents; the other seven having died in their lifetime, though after the death of the testatrix, intestate and unmarried, and two only of the seven, a son and a daughter, having attained the age of twenty one. Colonel Mair died in 1836, and Mrs. Mair in 1840.

The executors of Colonel Mair took out letters of administration of the personal estate of the seven deceased children; and in this suit, which was instituted for the purpose of having the

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trusts of the will of Mrs Baronneau established so far as related to the £5000 stock, they by their answer insisted that the children of Colonel Mair *took vested interests at their [*467] birth in that moiety of the stock in which Mrs. Mair had a life interest; and they, therefore claimed seven-elevenths of that moiety. At the hearing, however, they confined their claim to the shares of the two deceased children who attained twenty-one; the other claimants of those two shares being, on the one hand, the surviving children, all of whom had attained twenty-one, and two of whom were the plaintiffs in the suit; and on the other hand, Elizabeth Baronneau, as representing the residuary legatee of the testatrix.

Mr. Simpkinson and *Mr. Evans*, for the plaintiffs.

Mr. Boyle, for a defendant in the same interest.

Mr. Wigram and *Mr. Hall*, for the defendant Elizabeth Baronneau, contended, that the shares of the two children who attained twenty-one, and died in their parents' lifetime, lapsed to their client as representing the residuary legatee under the will of the testatrix; the interests of those children not having been vested, and there being no clause of survivorship in the will in favor of the living children: *Skey v. Barnes*,^(a) *Cross v. Crgss*.^(b)

Mr. Spence and *Mr. Blunt*, *Mr. Cooper* and *Mr. Shee*, appeared for other parties.

THE VICE-CHANCELLOR was of opinion, that the six children of Mrs. Mair who attained twenty-one took vested interests.

By the decree (as drawn up) it was declared, that the only children of Frances Helena Mair, who took vested interests in, or who were entitled to participate in, that portion of the legacy of £5000, 3l. 10s. per Cent. Reduced Annuities, the income whereof was, in the first instance, given to the said Frances Helena Baronneau (afterwards Mair) for her life, were *&c., [names of the six [*468] children,] being those only of the children of the said Frances Helena Baron-

(a) 3 Mer. 335.

(b) 7 Sim. 201.

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neau (afterwards Mair) who attained the age of twenty-one years, and that in the events which have happened one moiety of the £5000, 3l. 10s. Reduced Annuities, standing in the names of the Accountant-General, &c, is immediately divisible amongst [*names of the living children,*] and the defendants, David Williamson, William Fraser the younger, and George Tweedie, as the executors of Alexander Mair, deceased, and as the legal personal representatives of the said deceased children; and that four sixth parts thereof are transferable in manner following: that is to say, one of such last-mentioned sixth parts to the plaintiff Arthur Mair; one other of such last-mentioned sixth parts to the plaintiff J. M. Mair, spinster; and the two other of such last-mentioned sixth parts to the defendants David Williamson, William Fraser the younger, and George Tweedie Stodart, as such executors and personal representatives as aforesaid. * * *

Ex parte DAVIS—In the Matter of CLARK.

Where by a settlement a certain number of persons are appointed trustees, and power is given, upon the death or retirement of a trustee or trustees, to appoint any other person or persons to be a trustee or trustees in his or their room, the appointment of a greater than the original number of trustees is not a valid exercise of the power.[1]

UPON the treaty for the marriage of the petitioners, Charles Edward Davis and Catherine Dorothy, his wife, which took place at Singapore, in the East Indies, in January, 1821, it was agreed that 14,500 sicca rupees should be settled for the benefit of the parties and their issue. In furtherance of this agreement, two several sums of 8000 and 6500 sicca rupees, making together the sum of 14,500 sicca rupees, were deposited with Messrs. Fergusson, Clark, & Co., bankers, Calcutta, and were entered in their books in an account entitled "Trustees of Mrs. Catherine Davis in account with Fergusson, Clark, & Co."

By an indenture of settlement, dated the 2nd of March, 1824,

[1] That as a general rule, it is true, that there ought to be an adherence to the original number of trustees where new trustees are substituted, and that on the ground that this is conformable to the presumed intention of the parties, where nothing appears to the contrary. If, however, the instrument is so worded as to authorize an appointment of three trustees to succeed the two, such an intention appearing must have effect given to it. *Meinertzhagen v. Davis*, 1 Coll. 344.

1843.—*Ex parte Davis*.

and made between Charles Edward Davis and Catherine Dorothy, his wife, of the one part, and William Farquhar, David Clark, and John Campbell Burton, of the other part, it was witnessed, that they, the said W. Farquhar, David Clark, and J. C. Burton, should stand possessed of and interested in the said sum of 14,500 sicca rupees, in trust for the benefit of Charles Edward Davis and Catherine *Dorothy, his [*469] wife, and their issue, as therein mentioned. And it was thereby provided, that, in case the several trustees therein named should depart this life, or be desirous to be discharged from the execution of the aforesaid trusts, it should be lawful for the said C. E. Davis and Catherine Dorothy, his wife, jointly, or for the survivor of them alone, from time to time as often as there should be occasion, to nominate, substitute, or appoint any other person or persons to be a trustee or trustees in the place or stead of the trustee or trustees so dying or desiring to be discharged as aforesaid.

David Clark, one of the trustees named in this deed, was a partner in the house of Fergusson, Clark, & Co. In November, 1833, when the whole of the above sum was in their hands, an adjudication of insolvency was made against that house by the Court for Relief of Insolvent Debtors at Calcutta; and, in December, 1835, a fiat in bankruptcy issued against David Clark in England, under which he was duly declared a bankrupt. In that bankruptcy, the petitioner, Charles Edward Davis, proved, in respect of the trust fund, the sum of 920*l.* 15*s.* for principal, and 135*l.* 5*s.* 7*d.* for interest thereon.

By an indenture, dated the 1st of April, 1840, and made, or expressed to be made, between Charles Edward Davis and Catherine Dorothy, his wife, of the one part, and Sir Arthur Farquhar, John Chalmers, Adam Freer Smith, and Lewis Balfour, of the other part, it was witnessed, that, by virtue and in exercise of the power or authority to the petitioners, Charles E. Davis and Catherine Dorothy, his wife, for that purpose by the indenture of settlement given and reserved, they, the said C. E. Davis and Catherine Dorothy, his wife, testified by their signing and sealing the present indenture, did nominate and appoint the said Sir A. Farquhar, John Chalmers, Adam Freer Smith, and

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Lewis Balfour, to be trustees in the room and stead of the said W. Farquhar, David Clark, and J. C. Burton, *all* [*470] *then deceased*, to act in the trusts mentioned and declared in and by the said indenture of settlement.

Sir Arthur Farquhar declined to accept or act in execution of the trusts.

The petition was presented by C. E. Davis and his wife, and the persons (except Sir A. Farquhar) nominated as new trustees, praying payment to the latter persons, as trustees under the marriage settlement, of several sums which were payable under the proof made by C. E. Davis in Clark's bankruptcy.

Mr. *G. L. Russell*, for the petition.

THE VICE-CHANCELLOR (sitting as Chief Judge in Bankruptcy) expressed a doubt whether the power in the marriage settlement authorized the appointment of four trustees in the room of three; and he declined to make any order until he should be satisfied on that point. He requested the counsel for the petitioners to search for authorities on the subject.

On a subsequent day, *G. L. Russell* mentioned *Sands v. Nugee*(a) *D'Almaine v. Anderson*.(b)

His Honor observed, that, in *Sands v. Nugee*, the settlement was in the Scotch form; and that, in the case in *Lewin*, the words might admit of more than the original number of trustees being appointed. He thought, therefore, that those cases, though probably very rightly decided, were not authorities on the present occasion; and he declined to make the order, being of opinion that, under the circumstances of this case, the appointment of four trustees in the room of three was invalid.(c) His Honor, however, ordered the petition to be retained, with liberty to amend.

(a) 8 Sim. 130; *Lewin*, 744.

(b) *Lewin on Trusts*, p. 465.

(c) See *Chance on Powers*, sect. 2568; *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Devey v. Peace*, Tambl. 77.

1843.—Honywood v. Honywood.

*HONYWOOD V. HONYWOOD.

[*471]

1843: July 11th.

Under a proviso in a settlement, to which A. and his eldest son, B., were parties, a use which was limited to a younger son, P., and his issue, was made to shift to B., in the event of P. becoming entitled in possession to the manor of S., under certain limitations, which in the settlement were described as being contained in the will of A., bearing *even date* therewith. The will of A. contained the limitations mentioned in the settlement, but did not bear even date therewith, but a posterior date, which was written upon an erasure not accounted for:—*Held*, that, inasmuch as, under the circumstances of the case, the variance between the real date of the will and that mentioned in the settlement did not affect the substantial intention of the parties, the arrangement between them could in equity be carried into execution notwithstanding such variance.

Under a will, dated in 1827, by which the testator devised all the hereditaments which he should be entitled to at his death to trustees for sale:—*Held*, that an estate in which he had at his death a contingent interest in fee, both by way of shifting use and by virtue of an ultimate limitation in default of issue of his brother, did not pass.

IN 1811, William Honywood, the grandfather, and William Philip Honywood his eldest son and father of the plaintiff, suffered recoveries of various estates in Kent and Essex including amongst others, a considerable Kentish property, which by the will of General Philip Honywood, was devised to William Honywood for life, with remainder to W. P. Honywood, in tail male.

By indentures dated in July in the same year, a joint power of appointment was reserved to William Honywood and W. P. Honywood over all the estates, and subject thereto, they were settled to the use of William Honeywood for life, remainder to William Philip Honywood in fee.

By indentures of release, and of appointment and release, dated the 12th and 13th of November, 1812, William Honywood, and William Philip Honywood, in exercise of their joint power, limited and conveyed an estate in Kent, (called the Weald of Kent estate,) of gavelkind tenure, which was one of the estates devised by the will of General Philip Honywood, to such uses as they should by deed appoint, and subject thereto to the use of

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William Honywood for life, with remainder to the use of J. D. Brockman and W. D. Brockman, upon trust to preserve the contingent remainders, with remainder to the use of Philip James Honywood, the youngest son of William Honywood, for life, with remainder to the use of the before named trustees upon trust to preserve, &c., with remainder to the use of the first and other sons of Philip James Honywood, successively, in tail male, with remainder to the use of William Philip Hony-
[*472] wood, his *heirs and assigns; and the deed of appointment and release contained the following proviso:—Provided always, and it is hereby declared by the parties hereto, that in case the said Philip James Honywood, or any of his issue male, shall at any time or times after the decease of the said William Honywood, under and by virtue of the limitations contained in the last will of him, the said William Honywood, by him this day made and published, and bearing even date herewith, become seized or entitled in possession for an estate of freehold or inheritance respectively, of or to the manor, messuages, lands and other hereditaments, of and in Sibton, in the parish of Lyminge, in the said county of Kent, devised by the said will, or expressed and intended so to be, to Ralph Honywood, the second son of the said William Honywood, and the issue male of him the said Ralph Honywood, in strict settlement, with remainder to Edward Honywood, the third son of the said William Honywood, and the issue male of him, the said Edward Honywood, in strict settlement, with remainder to the said Philip James Honywood, and his issue male in like manner, then and in such case all and singular the uses and estates hereinbefore limited to or for the benefit of the said Philip James Honywood and his issue male, of and in the messuages, lands, and other hereditaments hereby appointed and released, or intended so to be, shall immediately thereupon absolutely cease and determine, and the same messuages, lands, and hereditaments shall thenceforth go and remain unto and to the only use of the said William Philip Honywood, his heirs and assigns, for ever.

William Honywood made his will and thereby settled the Sibton estate on his younger sons, Ralph, Edward, and Philip James, successively, in strict settlement, precisely in the manner speci-

1843.—*Honywood v. Honynwood*.

fied in the proviso; but the will, instead of bearing even date with the last-mentioned deed, was dated 6th January, 1813, and the date was written on an erasure.

By indentures of lease, and of appointment and *re- [*473] lease, dated the 24th and 25th August, 1814, William Honynwood and William Philip Honynwood made a further settlement of the estates comprised in the deeds of 1811, by appointing and conveying them to such uses as they should jointly appoint, with remainder to the use of William Honynwood for life, with remainder to such uses as William Philip Honynwood should appoint, with remainder to the said use of the said W. P. Honynwood, for life, with remainder to the use of J. D. Brockman and W. D. Brockman, and their heirs, upon trust to preserve the contingent remainders, with remainder to the first and other sons of the said W. P. Honynwood, successively, in tail male, with remainder to his daughters, as tenants in common in tail, with remainders over.

In the particular description of lands comprised in this settlement was comprehended a small part of the Weald of Kent estate, which had been already settled by the deed of 1812; and the particular description was followed by the general words, "all other the manors, messuages, lands, and hereditaments devised by the wills and codicils of Philip Honynwood, Filmer Honynwood, &c."

In 1818, William Honynwood died, leaving William Philip Honynwood, his eldest son, who thereupon became substantially entitled for his own benefit to the bulk of the family estates, and Ralph, Edward, and Philip James, his younger sons; Ralph coming into possession of the Sibton estate, under his father's will, and Philip James into the Weald estate, under the settlement of 1812.

It being afterwards apprehended that the effect of the deeds of 1814 might be to defeat those of 1812, William Philip Honynwood, by an indenture dated the 15th Sept., 1828, and made in execution of the power given him by the deed of 1814, confirmed the settlement of 1812; Philip James Honynwood conceding to his brother certain powers of felling timber. On the 20th September, 1829, W. P. Honynwood executed a further deed of con-

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firmation, which was indorsed on the preceding deed, [*474] and contained a more *accurate description, by means of a schedule, of the lands intended to be comprehended in the settlement of 1812.

It did not appear, that, on either of these occasions of confirmation, the discrepancy in the dates of William Honwood's will and the settlement of 1812 was ever adverted to. The deed of the 15th September, 1828, recited the deeds of 1812, but, in referring to the shifting clause, mentioned the will of William Honwood generally, without stating the date.

In 1831, William Philip Honwood died, leaving the plaintiff, William Philip Honwood, and Robert Honwood and Walter Honwood, all infants, his heirs in gavelkind. By his will, which was dated in 1827, and not afterwards republished, he directed that all his debts and legacies should be paid, as soon as conveniently might be after his decease, out of his personal estate not specifically bequeathed, and if that were not sufficient, he charged all his estates thereafter devised with the deficiency. And he gave and devised, and in exercise of every power enabling him in that behalf limited and appointed, all the manors, messuages, and other hereditaments of or to which he should be seised and entitled at the time of his death, and all the manors, messuages, and other hereditaments of which he was entitled to dispose by virtue of any special power, save and except his mansion-house, called Mark's Hall, and the pleasure-grounds adjoining, to Samuel Forster and Philip James Honwood, and their heirs, upon trust to pay and raise, with all convenient speed, after his death. or at such other time or times as they should think proper, by sale or mortgage of all or any part of the estate, such sums of money as they should judge expedient, in aid of his personalty not specifically bequeathed, for payment of his debts, and should pay the same accordingly ; and, subject to such trust, to convey, settle, and assure the manor and other hereditaments which should not be disposed of to the uses of the settlement of August, 1814.

[*475] *In 1839, Ralph and Edward Honwood having successively died without issue, (the latter dying in August, 1839,) Philip James Honwood entered into possession of the

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Sibton estate, under the limitations of his father's will; and it being considered that the Weald estate had thereupon shifted over, under the proviso in the settlement of 1812, to the trustees under William Philip Honynood's will, they entered into possession and contracted for the sale of a small portion of it to the South-eastern Railway Company; but, upon the investigation of the title on behalf of the purchasers, the discrepancy of dates between the will of William Honynood and the settlement of 1812 was discovered. The Company, objecting to the title, paid their purchase-money into Court, and it was invested in the purchase of 864*l.* 6*s.* 10*d.* Reduced £3 per Cent. Annuities.

In order to settle the question of title just stated, and also to ascertain whether, under the before-mentioned circumstances, the Weald of Kent estate devolved to the infant heirs in gavelkind, or to the devisees of William Philip Honynood, the present bill was filed on behalf of William Philip Honynood, the infant, against Philip James Honynood, J. D. Brockman, W. D. Brockman, Samuel Forster, and the infant brothers of the plaintiff, praying that it might be declared that by the will referred to in the settlement of the 13th November, 1812, was meant the will of the 6th January, 1813, and that the subsequent deeds might be rectified accordingly; and that it might be declared that the contingent interest in the Weald of Kent estate, depending on the event of Philip James Honynood being entitled to the Sibton estate, belonged in equity to the testator, William Philip Honynood, and passed by his will, or, if it did not pass by his will, or the devise thereof by his will was revoked by the indentures of September, 1828, and September, 1829, then that it descended to the plaintiff and his brothers as co-heirs in gavelkind of the testator, William Philip Honynood.

*The cause came on for hearing in March, 1842, when [*476] a decree was made by which various special inquiries were directed before the Master.

The Master, by his report, found that the testator made a will on the 13th November, 1812, being the same will as was therein set forth and mentioned to bear date the 6th January, 1813; but that he never made any will dated the 13th November, 1812, unless (as was conjectured from the appearance of the instrument

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and the collateral circumstances) the will dated the 6th January, 1813, originally bore date the 13th November, 1812. And he found that the instrument or writing meant or intended by the indenture of the 13th November, 1812, was the will bearing date the 6th January, 1813. The Master then, after setting out the will, and stating a suggestion of the plaintiff, that the execution of the will had been deferred from the 13th November, for the purpose of making some alteration having no reference to the question in the suit, and that the importance of the date of the will had been on that occasion forgotten or overlooked, and after referring to an affidavit of R. W. Clarkson annexed to the will, which was to the effect that the date thereof was altered to that of the 6th January, 1813, previously to the execution, found that the indentures of the 12th and 13th November, 1812, and the will of William Honywood, were prepared in the office of R. W. and George Clarkson, who were at that time the solicitors of William Honywood, and who retired from business in the year 1828, and were both since dead in foreign parts. Under all these circumstances, the Master stated his opinion to be, that the said will was prepared and intended to be executed on the 13th November, 1812, and was altered in manner aforesaid to the 6th January, 1813. And he also found that the instrument or writing meant or intended by the indenture of the 15th September, 1828, by the description of the will of William Honywood, was the will of the 6th January, 1813.

[*477] *No other evidence than what has been stated was produced before the Master, or could be procured, respecting the will in question. Upon production of the instrument, the letters "th" and "ber," being, it was conjectured, the concluding letters of the words "thirteenth" and "November," were faintly perceptible under the substituted date. Several sheets in the body of the will were also written in a different hand from that in which the principal part was written, and had the appearance of being introduced in lieu of part of the original manuscript.

The cause now came on to be heard for further directions.

Mr. Russell and *Mr. Sidebottom*, for the plaintiff.

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Mr. *Simpkinson* and Mr. *Messiter*, for the defendants the trustees.

Mr. *Wigram* and Mr. *Chambers*, for the defendants the co-heirs in gavelkind.

THE VICE-CHANCELLOR said, that, assuming that the shifting use took effect, he was of opinion that the Weald of Kent estate vested in William Philip Honywood in fee, and, not being affected by his will, and being of gavelkind tenure, descended upon the plaintiff and his brothers the defendants, as his heirs-at-law. His Honor then asked, whether any of the parties desired a case to be sent for the opinion of a court of law, as to the validity of the shifting use.

No one desiring a case,

His Honor said, that, adopting the Master's report as to the facts of the case, he was of opinion that the shifting use took effect.

*By the decree (as drawn up) it was declared, that Philip James Hony- [*478] wood, in the pleadings named, having, upon the death of Edward Honywood without issue male, become entitled in possession for an estate of freehold of and in the Sibton estate, in the pleadings mentioned, under the will of William Honywood, also in the pleadings mentioned, the messuages, lands, and tenements comprised in the indentures of the 13th November, 1812, the 15th September, 1828, and the 20th September, 1829, thereupon remained to the only use of the plaintiff, William Philip Honywood, and the defendants, Robert Honywood and Walter Honywood, the co-heirs in gavelkind of William Phillip Honywood, deceased, and their heirs; and it was declared, that the 86*l.* 8*s.* 10*d.* Reduced £3 per cent. Annuities, standing in the name of the Accountant-General of this court, in trust in this cause, to the account. "The claimants of the estate settled upon Philip James Honywood by the late William Honywood and William Philip Honywood," and all dividends accrued due thereon, belong to the plaintiff, W. P. Honywood, and the defendants, Robert Honywood and Walter Honywood, as such co-heirs. And it was ordered, that it should be referred to the Master to inquire whether it would be for the benefit of the infant plaintiff and the infant defendants, R and W. Honywood, that any and what deeds should be executed, touching the said lands, &c. * * * And it was ordered, that it should be referred to the taxing Master of this court in rotation to tax all parties their costs, charges, and expenses of this suit, and certify the amount thereof. And it was declared, that it would be right, and for the benefit of

 1843.—Honywood v Honywood.

all parties interested, that such costs, charges, and expenses should be paid out of the said 864*l.* 8*s.* 10*d.* Reduced £3 per Cent. Annuities, and the dividends accrued, or hereafter to accrue, due thereon previous to such payment. And any of the parties were to be at liberty to apply to this court, as they might be advised, for the payment of their said costs, charges, and expenses, out of the said annuities and dividends.

 SNOWBALL V. PROCTER.

1843: July 13th.

Testator, by his will, directed that the profits of his share of a leasehold colliery should, during the time that the same was worked or workable, be equally divided amongst "his wife and children and their children after them respectively:"—*Held*, upon the construction of the whole will, that the words "their children after them respectively" were words of limitation.

JOHN SNOWBALL, being possessed of considerable real and personal property, the latter including a share in a colliery, held for a term of years, by his will, dated the 22nd February, 1823, bequeathed as follows:—"I give and bequeath unto my dear wife, Elizabeth Snowball, the interest of the £1000 in [*479] the new £4 per Cents., placed *there in the names of Joseph Snowball and John Pedley, in trust during her natural life, as stated in our marriage settlement, and also the interest of £1700, now in the hands of the Marquis of Aylesbury, which last-mentioned £1700, together with all my live stock, (if any,) household furniture, plate, linen, goods and chattels, I give to my said wife, to be at her death sold or divided in equal portions amongst my five children, namely, John, Charles, Henry, Joseph George, Sarah Ann, and Gilbert Francis, or otherwise amongst my said children, according to her discretion. There are four small freehold estates in Northumberland, the property of my late father, [*naming the estates,*] and when my share thereof shall be delivered over to my said wife or children, the same, together with all my other property in the funds, securities, or otherwise, shall, after my just debts and funeral expenses are paid, be equally divided amongst my said children when they severally attain the age of twenty-four years, either by sale of such estates, or the rents thereof, (as they become due,) as a

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majority of them may agree upon : and in case any of my said children should die without issue, it is my wish and desire that their share or shares of my property shall be equally divided amongst my surviving children ; and the same regulations shall be observed in regard to my one-twentieth share of the Tyne Main Colliery, (otherwise Gateshead Park Colliery,) namely, that the profits of which, or in case the working of the same shall be given up, and all the materials, horses, staithes, &c., sold my share of the same, shall be equally divided amongst my said wife and children ; but during the time the said colliery is worked or workable, my share thereof shall not be sold, but the profits thereof shall yearly, or as they become due, be equally divided amongst my said wife and children, *and their children after them, respectively* ; and all the interest money of my property, rents or profits, (except such part thereof as I have herein mentioned and set apart for *the support and [480] maintenance of my said wife during her natural life and left to her disposal amongst my said children,) in the funds, securities, or otherwise, together with the profits arising from the above-mentioned colliery, lands, and houses, shall be for the necessary and proper support and education of my said children. And lastly, I hereby appoint my said wife, the Rev. John Earl, and the Rev. John Richardson, joint executors of this my last will and testament."

The testator died in March, 1825, leaving his widow and the several children named in his will (and no others) surviving him. His will was duly proved, and his debts and legacies paid by his executors.

The colliery continued to be worked from the date of the testator's will to the filing of the present bill. The widow, during her life, received the profits of one-sixth of the twentieth share formerly held by the testator, and considering herself absolutely entitled to that one-sixth, she bequeathed it to her sons John Charles, whom she appointed her executor, Henry, and Joseph George. By an arrangement, however, amongst the children after her death, it was divided amongst them equally.

The widow died in 1839, having survived both her co-executors. Her will was duly proved by John Charles Snowball.

1843.—*Snowball v. Procter.*

All the testator's children, except Gilbert Francis, attained their age of twenty-four years, before the filing of the bill.

Sarah Ann, the testator's daughter, died in May, 1842, having in 1833, married James Procter, by whom she had five children, one of whom only, namely, John James Procter, was living at the time of the filing of the bill.

Of the testator's sons, Joseph George Snowball was married in 1840, and had one child only, who died before the filing of the bill. The other sons of the testator were unmarried.

[*481] The bill was filed by John Charles Snowball as the personal representative of the testator, against James Procter, as the administrator of Sarah Ann Procter, John James Procter, and the three younger sons of the testator, praying that the trusts of the will might be carried into execution, as to the testator's twentieth share of the colliery, and that the rights of all parties therein might be declared; the principal object of the bill being, to ascertain whether the testator's children took absolute interests in such share, or whether upon their deaths an interest therein devolved upon their children.

Mr. *Pigott*, for the plaintiff.

Mr. *Malins*, for the defendants James Procter, Henry Snowball, and Joseph George Snowball.—The testator's children take absolute interests, the words of the will being sufficient, supposing them applied to real property, to give them estates tail: *Campbell v. Harding*; (a) *Wyld v. Lewis*. (b) The words "after them" are not sufficiently strong to prevent the operation of the general rule, and it is impossible to suppose that the word "their" can refer to any other antecedent than the word "children." In the previous clause, where the testator speaks of the working of the mine being given up, he clearly gives the children an absolute interest.

Mr. *Rolt*, for the defendant John James Procter.—Does the bequest over, after the failure of issue of the children, point to a

(a) 2 Russ. & M. 390.

(b) 1 Atk. 432.

 1843.—Snowball v. Procter.

personal enjoyment of the legacy by the legatee? If it does, the failure of issue means, failure of issue at the death of the tenant for life: *Campbell v. Harding*. Now, here, the first part of the bequest of the colliery is no doubt absolute, but in the latter part of the bequest, where the "testator contemplates the colliery in a state of being worked, he alters the limitation: he no longer says "wife and children," but wife and children, and their children after them;" showing that a personal benefit was intended to each successive legatee. The latter words must have been introduced for a specific purpose, namely, to limit, in a certain event, the absolute interest previously given to the children. [The *Vice-Chancellor* referred to the observations in *Massey v. Hudson*,^(a) which occur in his Honor's judgment in *Garratt v. Cockerell*.^(b)]

Mr. *Bacon*, for the defendant Gilbert Francis Snowball, contended, that his client took an absolute interest in one-fifth of the testator's share of the colliery, although he had not attained the age of twenty-four; and that, even if he died under twenty-four, his interest would not go over, inasmuch as the direction as to the children attaining twenty-four did not apply to the colliery.

THE VICE-CHANCELLOR.—It appears to me, that, taking the whole of this will together, the direction in the first instance, for the division of the property, includes the colliery. I consider it as governed by these words:—"There are four estates, &c.; and when my share thereof shall be delivered over to my said wife or children, the same, together with all my other property in the funds, securities, or otherwise, shall, after my just debts and funeral expenses are paid, be equally divided amongst my said children, when they severally attain the age of twenty-four years, either by sale of the said estates, or the rents thereof, (as they become due,) as a majority of them may agree upon." Stopping there for a moment, and then going to the end of the will, it is clear that the testator does not mean that the

(a) 2 Mer. 133.

(b) Ante, Vol. 1, p. 501

1843.—Snowball v. Procter.

[*483] gift of the income shall be delayed *until the children attain twenty-four, because he says, that "all the interest money of my property, rents or profits, [except such part thereof as I have herein mentioned and set apart for the support and maintenance of my said wife during her natural life, and left to her disposal amongst my said children,] in the *funds, securities, or otherwise*, together with the profits arising from the above-mentioned colliery, land, and houses, shall be for the necessary and proper support and education of my said children." The income, therefore, is not postponed by this reference to the period of twenty-four years, and consequently the words "when they severally attain the age of twenty-four years" relate only to the capital. And I am of opinion that the words "die without issue" mean "die under the age of twenty-four without issue."

These words, however, it is said, do not apply to the colliery. If not, are there any other words which lead to the same result? Going to the bequest of the colliery, we find that, in case it is given up, the same regulation is to apply to it as to the rest of the property; but during the time that it is worked or workable, the profits thereof "shall yearly, or as they become due, be equally divided amongst my said wife and children, and *their children after them*, respectively." Neither of the children married in the testator's lifetime. I think it is clear upon the whole will that the words "their children after them respectively" are words of limitation, and not words of purchase. It follows, not only that the grandchildren of the testator take no interest, but that the persons to benefit by the death of Gilbert Francis under the age of twenty-four would be the other children, or some of them. It appears, therefore, that, in one way or the other, parties now before the Court have amongst themselves the absolute interest in the leasehold colliery, and by their consent a declaration may be made that they are equally entitled.

[*484] *DECLARE that the defendant John James Procter, and the other grandchildren of the testator, take no interest under the will; and, it being admitted that the sole next of kin of the testator at his death were the five children, and the personal representative of the widow consenting, and the defendant James Procter, as the personal representative of his wife, consenting, and the plaintiff and the other sons of the testator consenting, declare that the leasehold colliery belongs to the plaintiff

 1843.—Snowball v. Procter.

and the defendants James Procter, Henry Snowball, J. G. Snowball, and Gilbert F. Snowball, absolutely, in equal shares.

MANSSELL V. GROVE.

1843: July 19th.

Bequest of residue to A. for his life, and his heirs male after him; and if he should not leave any son, then to go to B. and his heirs male. Upon the death of A. without leaving male issue, the limitation to B. takes effect.

CORNELIA PLEYDELL, by her will, bequeathed as follows ;—
 “All that I am possessed of I give in the following manner :—I appoint Anne Pleydell and Mary Pleydell, spinsters, joint executrices and residuary legatees, after having paid the legacies herein specified ; [*she then gave various pecuniary and specific legacies, and concluded thus :*] The remainder Anne and Mary Pleydell are to enjoy for their lives ; but if they both die without leaving a child, it is all then to go to Edward Moreton Pleydell for his life, and his heirs male after him ; if he should not leave any son, then to go to William Moreton Pleydell, and his heirs male. As soon as it comes into the possession of Edward Moreton Pleydell and his heirs, it is to be subject to an annuity of £100 a year to Miss Anne Pleydell, eldest daughter of the said Edward Moreton Pleydell, and to be continued by William Moreton Pleydell and his heirs for her life.”

The testatrix died in the year 1807.

William Moreton Pleydell died in 1824, without ever having had issue.

Edward Moreton Pleydell died in 1835, having had one son only, who died without issue in 1811.

Anne Pleydell and Mary Pleydell died respectively in the years 1841 and 1842, unmarried.

The debts and legacies of the testatrix were long since *paid and the residue was considerable. The [*485] question was, who, upon the death of Mary Pleydell, was entitled to the *corpus* of the residue.

 1843.—*Mansell v. Grove*.

Mr. *Elmsley*, for the plaintiff.

Mr. *Hodgson* and Mr. *Hore*, for the personal representative of Edward Moreton Pleydell, contended that the word "child," in the limitations to Anne and Mary Pleydell, must be construed according to general rules, and must, having reference to personalty, be taken to mean "issue living at the death" of the legatee; but that the word "son," in the limitation to Edward Moreton Pleydell, was synonymous with the words immediately preceding, namely, "heirs male;" and if so, the gift over to William Moreton Pleydell would be void for remoteness. Upon this point *Cursham v. Newland*(a) might be cited on the other side, but that case was, in several points, distinguishable from the present.

Mr. *Wigram*, for the personal representatives of Anne and Mary Pleydell.

Mr. *Russell* and Mr. *Messiter*, for the representatives of Edward Moreton Pleydell.

THE VICE-CHANCELLOR.(b)—As neither Anne Pleydell nor Mary Pleydell left any issue, nor Edward Moreton Pleydell any male issue, it is immaterial to consider whether the word "child" ought to be read strictly, or as meaning "issue," and whether the word "son" ought to be read strictly, or as meaning male issue. I give no opinion on either of those points. The question is, whether the word "leaving" and the word "leave" are to be construed strictly according to the ordinary signification, as importing the not leaving issue at the death of the former taker. The ordinary, if not the universal rule of the [*486] Court, in cases of this *description affecting mere personal estate, is, that such words import not an indefinite failure of issue, but a failure of issue at the death of the preceding taker. I am of opinion, that that must necessarily, be the construction of the words here. As neither Anne nor Mary

(a) 2 Beav. 145.

(b) *Ex relatione*, Mr. W. W. Cooper.

1843.—Mansell v. Grove.

Pleydell left issue, and as Edward Moreton Pleydell did not leave any son or male issue, I think that the gift to William Moreton Pledell took effect. It was a gift to him absolutely; and consequently, as he survived the testatrix, he took the whole.

It being admitted that Anne and Mary Pleydell died without ever having been married, and that Edward Moreton Pleydell died without leaving any male issue, and that all the debts and funeral and testamentary expenses and legacies of testator have been paid, (leaving the fund clear,) declare that the representatives of William Moreton Pleydell are absolutely entitled to the fund.

ETTY v. BRIDGES.

1843: July 20th and 25th.

A. for valuable consideration takes a security upon a reversionary sum of stock, at a time when, by reason of the death of the person in whose name the stock stood without legal representatives, no notice of the incumbrance could be given to the trustee of the fund.[1] A., however, does not attempt, by *distringas* or otherwise, to perfect the security. Afterwards, B., for valuable consideration and without notice of A.'s incumbrance, takes a security upon the same fund, and at the same time serves a writ of *distringas* on the Bank of England. B.'s security has priority over that of A.

THE bill was filed for the purpose of obtaining a declaration, that the plaintiff's incumbrance upon certain stock, standing in the name of George Bridges, the younger, had priority over the incumbrances of the defendant John Alexander Thompson Smyth, upon the same stock. The facts of the case, and the nature of the arguments for the plaintiff, will sufficiently appear from the judgment. The counsel for the defendants were not called upon to address the Court.

Mr. *Simpkinson* and Mr. *Bacon*, for the plaintiff.

Mr. *Pole*, for the defendant Bridges.

[1] See *Holt v. Dewell*, 4 Hare, 452, note 1.

1843.—*Etty v. Bridges.*

Mr. *Wigram* and Mr. *Spurrier*, for the defendant *Smyth*.

Mr. *Swanston* and Mr. *Freeling*, for the assignees of G. J. *Freeman*.

[*487] "The following cases were referred to in argument :—
Dearle v. Hall, (a) *Loveridge v. Cooper*, (b) *Rose v. Clarke*, (c)
Willoughby v. Willoughby, (d) *Stanhope v. Verney*. (e)

July 25th—THE VICE-CHANCELLOR.—George Bridges, the younger, as the sole executor of George Bridges, the elder, had a sum of £1000, 3l. 10s. per Cent. Bank Annuities, standing in his name, which he held in trust for the benefit of a lady named *Freeman* for her life, and subject to her life interest, for the benefit of her son, George John *Freeman*, absolutely. Mrs. *Freeman*, under a power of attorney executed by George Bridges, the younger, to certain London bankers, as I collect, was in the receipt of the dividends, and continued to be so until her death, which happened in 1837, although George Bridges, the younger, died in 1834, or 1835; his death not having been communicated to the bank of England until after hers. George Bridges, the younger, left a will, of which he appointed his wife and his son, the defendant John William Bridges, the executors. This will was not proved until the month of May, 1840, when the defendant John William Bridges alone proved it. The executrix has never obtained or applied for probate, as I collect. Thus, until May, 1840, there was not, from the time of the death of George Bridges, the younger, which happened, as I have said, before 1836, any legal personal representative of George Bridges, the elder, or of George Bridges, the younger.

In the month of March, 1836, the plaintiff took an assignment from George John *Freeman* of his reversionary interest in the stock, by way of mortgage for valuable consideration. But it is admitted that, previously to the year 1838, notice or any intimation of this transaction was not given to Mrs. Bridges
 [*488] and Mr. John William Bridges, or *either of them, or any agent of either of them, or to the Bank of England, or to

(a) 3 Russ. 1.

(b) Id. 30.

(c) *Ante*, Vol. 1., p. 534.

(d) 1 T. R. 763.

(e) *Butt. Co. Litt.* 290. b., note (1.), s. 15; 2 *Eden*, 81.

1843.—Ettv v. Bridges.

the bankers who received the dividends. It is admitted also, that, previously to 1838, not any proceeding, by *distringas* or otherwise, was taken on the part of the plaintiff to complete, or perfects or protect her security.

The defendant Smyth, in the month of August, 1826, and in October of the same year, purchased two annuities of George John Freeman, and for securing them, took from him two charges of his reversionary interest in the stock, by deeds dated in those months respectively; the transaction being for valuable consideration. Each purchase was made by Mr. Smyth without any notice, actual or constructive, of the plaintiff's security. There is not any reason to suppose that he believed the property to be otherwise than unincumbered. On the occasion of these two purchases by Smyth, or one of them, he appears to have taken some precautionary measures, with a view to protecting or at least ascertaining the clearness of the title; but whether, independently of the *distringas* that I shall presently mention, and the written communication accompanying it, they were or could be effectual, so as to gain priority over the plaintiff—and in particular whether notice was given to Mr. John William Bridges, or his solicitor, on the part of Mr. Smyth before the year 1838, and, if so given, was a material and effectual measures as against the plaintiff, I do not find it necessary to express any opinion.—It appears, however, that in October, 1836, on the eve of the completion of Mr. Smyth's second purchase, and in substance (for so I think it may be taken) as a part of that transaction, a writ of *distringas* was issued and served by his solicitor, in the manner shown by Mr. Diggle's evidence,

The evidence of Mr. Diggles, who is described as a solicitor, is thus:—"I served the documents now produced and shown to me, marked respectively I. and K., on the behalf of Mr. John Alexander Thompson Smyth, upon the *Governor [*489] and Company of the bank of England, on the 15th October, 1836 by delivering the same, together, on that day, to one of the clerks in the employ of Messrs. Freshfield & Co., the solicitors of the bank of England. at their office in Lothbery, in the city of London. The name or signature, George Diggles, signed to the said produced document marked K., is in my own hand-

 1843.—*Etty v. Bridges.*

writing." The documents marked I and L., of which he speaks, are these: I. appears to be a copy of a writ of *distringas* in the form which was then usual, commanding the sheriff of London to distrain upon the Governor and company of the bank of England, "so that they do appear before the Barons of our Exchequer at Westminster, on the 2nd day of November next, to answer a certain bill of complaint lately exhibited against them, the defendants, before the Chancellor and Barons of our said Exchequer at Westminster, by John Alexander Thompson Smyth, Esq., plaintiff, and further to do and receive what our Court shall then and there order." I believe that the bill mentioned in these writs of *distringas* was merely imaginary. I read the writ for the purpose only of showing that it mentions the name of the person for whose interest it issued.

The exhibit marked K., of which Mr. Diggles also speaks, is this:—

"To the Secretary of the Governor and Company of the Bank of England.

"Sir,—You will please to take notice, that the writ of *distringas*, a copy of which is sent herewith, is for the purpose of restraining the transfer of the sum of £1000, 3*l.* 10*s.* per Cent. Reduced Annuities, standing in the name of George Bridges, of Mistley, near Mannintree, Esq., deceased.

"I have the honor to be, &c.

"GEORGE DIGGLES,

"12, Sockville Street, Piccadilly, Solicitor.

"15th October, 1836."

[*490] *Then under it there is—

"Served on date at the bank, and saw the *distringas* entered.
"G. D."

So that this notice mentions the amount of stock, and mentions the name in which that stock is standing.

The truth of the memorandum at the foot of the exhibit K. (below the signature) is not, I believe, proved, except as it is to be collected from the testimony just read of Mr. Diggles, and the evidence of Mr. Christmas, which is thus:—(Mr. Christmas

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is described as librarian to the Bank of England)—“The document now produced and shown to me, marked K. K., contains a true copy of the account in the name of George Bridges, deceased, contained in one of the ledgers belonging to the Governor and Company of the Bank of England, for the 3*l*, 10*s*. per Cent. Reduced Annuities, converted from the £4 per Cent. Annuities; and the document now produced and shown to me, marked L. L., contains a true copy of the continuation of the account in another of the ledgers belonging to the Governor and Company of the Bank of England, relating to the said 3*l*. 10*s*. per Cent. Reduced Annuities. The said produced documents have been carefully examined and compared by me with the said documents respectively, of which they respectively purport to contain copies, at the Bank of England, where the said ledgers are kept in my custody.”

The exhibits, of which Mr. Christmas speaks, are these. The first, K. K., is in these terms.—

“In 89, 14 A. 79 R. O., Williams J. Deacon, J. Labouchere, H. S. Thornton, and J. T. L. Melville, dividends, 2058. George Bridges, deceased, creditor.” “1840, Oct. 10. To ledger 2, folio 1176, £1000. March 29, 1824, ledger,” and so on. “George Bridges, sole executor.” Then written over this account, in red ink, is this memorandum:—“Transfer stopt by *distringas*, at the suit of John *Alexander Thompson Smyth, [*491] the 15th day of October, 1836.” The exhibit L. L. is the copy of the account carried on when John William Bridges had proved the will; and it is not necessary to mention the figures on it, except that underneath the words “George Bridges, deceased, sole executor,” there are “John William Bridges, acting executor of George Bridges, who has the sole executor.” Upon that again is the note, “Transfer stopt by *distringas*, at the suit of John Alexander Thompson Smyth, 15th October, 1836.” But I assume that the entry copied into the exhibit K. K. was the only one of those which was in existence before John William Bridges proved the will.

I must, I think, consider (at least unless an inquiry on the subject shall be asked by the plaintiff’s counsel) that the entry relating to the *distringas*, which appears on the exhibit K. K.,

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was actually made in the Bank ledger, in the form and manner shown by this exhibit, in the month of October, 1836, and that its effect was, that, according to the ordinary and constant course of business pursued at the Bank of England, the Bank would not have permitted a transfer of the stock to be made by any person, without first giving, at least, three or four, if not seven or eight, days' notice to Mr. Smyth, or his agent, Mr. Diggles, in order to enable Smyth to take, if entitled to take, measures effectual for protecting the property. This having been done on Mr. Smyth's part, in 1836, and nothing having been done on the plaintiff's part before 1838, I assume (but without deciding) that, supposing priority not to have been gained for Symth by the *distringas*, the paper accompanying it, and the entry of 1836, in the Bank ledger, the plaintiff retains her priority, and is entitled accordingly. Was, then, priority thus gained for Mr. Smyth? The plaintiff contends, that, between the year 1835 and the month of May, 1840, there was not any trustee of the fund; consequently, that notice, during that interval, [*492] was not necessary or possible; and that, whether notice during that interval was necessary or possible, or unnecessary or impossible, the *distringas*, the paper accompanying it, and the entry of 1836, in the ledger, amounted to nothing. From this last part of her contention, I dissent without giving any opinion as to the residue. That notice should be given to the trustee of a fund upon dealing with an equitable interest in it, is not, I apprehend, so much a rule, as an example, or instance, or effect of a rule. In *Dearle v. Hall*,^(a) we find Lord *Lyndhurst* thus expressing himself: "In cases like the present, the act of giving the trustee notice is, in a certain degree, taking possession of the fund: it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice." Sir *Thomas Plumer's* previous observations in the same case, which occur between the 20th and 28th pages of the same volume, are, with more minuteness of detail, to the same effect. The opinions of the Judges, in *Ryall v. Rowles*,^(b)

(a) 3 Rnm. 1; see pp. 58, 59.

(b) 1 Ves. sen. 348; 1 Atk. 165

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of which that of Mr. Justice *Burnett* has been reported from his note-book by Mr. *Bligh*,^(a) contain recognitions of the same principle. So the opinion, in *Foster v. Cockerell*,^(b) of Lord *Lyndhurst*, upon advising the House of Lords to affirm Sir *John Leach's* decision in *Foster v. Blackstone* ;^(c) in which case the latter learned Judge had before thus expressed himself : “ A better equity is, where a second incumbrancer, without notice, takes a protection against a subsequent incumbrancer, which the prior incumbrancer has neglected to take. Thus a declaration of trust of an outstanding term, accompanied by delivery of the deeds creating and continuing the term, gives a better equity than a mere declaration of trust to a prior incumbrancer.” These authorities, though not the only authorities, are, I apprehend, more than sufficient *to show the rule to be, that, [*493] to perfect a transaction of the description now in question, the purchaser or incumbrancer must, if he cannot acquire possession, go as near it as he can—as the circumstances of the case will permit—must in a sense, if the expression may be used, set his mark upon the property, or do every thing reasonably practicable to prevent it from being dealt with in fraud of an innocent purchaser afterwards. The law has held, that, generally, where there are trustees, this is done sufficiently, upon dealing with an equitable interest in the fund, by giving them notice ; because, although the notice does not necessarily prevent such a fraud, it renders its commission much less likely, and gives an increased probability or an increased chance of redress, if the fraud shall be committed, supposing reasonable diligence to be used ; inasmuch as not only will the trustees, if asked, be likely to give information of the notice, but if they shall fail to do so, they may be liable to make good the loss. It is obvious, however, that unfairness or forgetfulness, or negligence on a trustee's part, or his death or infirmity, may render the notice, as a prevention of fraud, useless. What, however, is the effect of a *distringas* upon stock, when the subject of contract is an equitable interest in that stock ? It seems to me to operate, I do not say

^(a) 9 Bligh. N. S. 378.^(b) Id. 332 ; 3 Cl. & Fin. 456^(c) 1 Myl. & K. 297 ; see pp. 306, 307.

1843.—*Etty v. Bridges*.

as much as notice to the trustee, where there is a trustee, but something more efficacious. That which the notice makes unlikely, the *distringas* makes substantially impracticable; and accordingly, without saying whether, for such a purpose as that now in question, the entry in the Bank ledger in this case is or is not substantially, as well as in form and species, different from an indorsement on a security or material muniment of title, or from an entry in an ordinary banker's book, upon the face or margin of a customer's account,—without saying also what, in a case of ordinary debt from A. to B., in trust for C., may be the value or effect of a notice to A.,—without saying also, [*494] whether, in a *case of stock, where two incumbrancers give each in due time a notice to the trustee, and the latter, but not the earlier, of the two incumbrancers, places a *distringas* on the fund, the *distringas* ought to give a preference,—and without saying what, in the present instance, it would have been right to decide if the will of George Bridges, the younger, had been proved in 1835, by John William Bridges,—I think that, circumstanced as this case actually was, the *distringas* served upon the Bank, and entered in the Bank ledger, as I take it to have been in 1836, was a proper and an effectual measure of caution and protection, which, taken by Mr. Smyth, before any measure of caution or protection was taken by the plaintiff, must, upon principle, equally, and authority, place her security below each of his. That the plaintiff's notice of her charge to the defendant Mr. Bridges was, if it was, prior to any notice, or contemporaneous with the first notice, to him of Smyth's title, I consider, under the circumstances, as not material; it being clear, as I have said, that before 1838 the plaintiff did nothing.

It is, I think, upon *Foster v. Cockerell*, and upon principle, immaterial also, that Smyth omitted, if he did omit, to inquire of the Bank of England or its agents, whether there was any *distringas* prior to his. Sir *James Wigram* has taken the same view of such a point, in a case of *Meux v. Bell*, reported by Mr.

 1843.—*Etty v. Bridges.*

Hare,^(a) where I have found a valuable examination of authorities.

I have not thought it necessary to advert to the case of *Timson v. Ramsbottom* before Lord *Langdale*,^(b) or to that of *Jones v. Jones*, before Sir *Lancelot Shadwell*.^(c) On different grounds, each of them is very unlike the present. But there is a case of *Greening v. Beckford*,^(d) before the latter learned Judge, which may be thought not very far from resembling this.

*The plaintiff's counsel will inform me, whether they [*495] desire an inquiry as to the *distringas*, in the respects that I have mentioned.

The inquiry was not asked.



LEACH V. LEACH.

1843: July 15th and 22nd.

Testator bequeathed all the stock in the funds which he might die possessed of, to trustees, upon trust to pay an annuity to his wife for life, and after her decease upon trust to pay and apply the dividends of the stock to and for the proper use and benefit of E, the eldest daughter of his brother J., and the other children of his said brother, in equal shares, for their respective lives. And he directed that the principal stock should be divided and apportioned to and amongst all and every the lawful issue of the said E., and the other children of his said brother, in equal shares and proportions, and be assigned to them respectively, upon their severally attaining the age of twenty-one years, and to the survivors or survivor of them. He left the residue of his estate to his wife. By a codicil he explained that by E. the eldest daughter of his brother, he meant an illegitimate daughter called E. At the date of the testator's will and of his death, his brother had three children only; namely, E., M., and J. Of these, E. survived the widow and had a child, who also survived the widow; M. died in the widow's lifetime, leaving a child who survived the widow; and J. died in the widow's lifetime without leaving issue:—*Held*, that by the expression "E. and the other children," the testator intended the three children of his brother living at the date of the will; that each of the three children took a life-interest only in one third of the dividends; and, consequently, that upon the death of the widow, E. took a life-interest in one third of the dividends, and each of the children of E., and M., took one third of the capital.

(a) 1 *Hare*, 73.

(b) 2 *Keen*, 35.

(c) 8 *Sim.* 633.

(d) 5 *Sim.* 195

1843.—*Leach v. Leach.*

JOSEPH BURNARD, by his will, dated the 31st July, 1824, bequeathed as follows:—I give and bequeath unto John Yard Willats and John Hurden, and to the survivor of them, and the executors and administrators of such survivor, all and singular the stock and Government funds, standing in my name in the books of the Bank of England, or which I may die possessed of or entitled to, upon and for the several trusts, intents, and purposes hereinafter mentioned and described (that is to say,) in trust, to pay unto my wife, &c.—[Here followed bequests of several small annuities to his wife for her life or widowhood, and to his brother, John Burnard, and to his sister, Elizabeth Brain, for their respective lives:] and from and after the decease of my said wife, or upon her subsequent marriage, and also from and after the death of my brother and sister, upon further trust to pay and apply the dividends and interest of the said principal stock and funds, to and for the proper use and benefit of Elizabeth Burnard, the eldest daughter of my said brother, John Burnard, and the other children of my said brother, in equal [*496] shares and proportions, for *and during the term of their natural lives. And it is my will that the principal stock and funds shall be divided and apportioned to and amongst all and every the lawful issue of the said Elizabeth Burnard, and the other children of my said brother, in equal shares and proportions, and be assigned to and transferred to them, respectively, upon their severally attaining the age of twenty-one years, and to the survivors or survivor of them: and the testator thereby gave all the residue of his personal estate, after payment thereof of his debts, funeral, and testamentary expenses, and legacies, unto his wife; and appointed the said John Yard Willats, and John Hurden, executors of his will.

By a codicil, the testator declared, that the bequest in his will to Elizabeth Burnard, the eldest daughter of his brother, John Burnard, was intended for the illegitimate child of his brother, called or named Elizabeth Burnard.

The testator died in November, 1824, leaving his widow and the several annuitants named in his will, surviving him. In 1828, a suit (that of "*Willats v. Burnard*,") was instituted by his executors for the purpose of having his estate administered

1843.—*Leach v. Leach*.

in this Court. In that suit, the sum of £2500, new £4 per cent. annuities, being the bulk of the testator's residuary property, was transferred into the name of the accountant-general, in trust in the cause; and by a decretal order, it was declared, that subject to the payment of the several annuities, the widow, as residuary legatee under the will, was entitled to the dividends of the £2500 stock, to accrue due during the lives of the annuitants, and the survivor of them, and after their deaths, during the life of the widow, and her continuing unmarried; and payment of the dividends was ordered accordingly. And after the death of the annuitants, and the death or second marriage of the widow, any of the parties interested in the stock were to be at liberty to apply.

At the date of the testator's will, and of his death, John *Burnard had three children only, of whom the [*497] youngest was at his death about six years of age; namely, Elizabeth, Mary, and Joseph. Elizabeth married in 1840, George Leach, by whom she had one child only, George William Leach. Mary married in 1833, John Bingham by whom she had one child only, Elizabeth, and died in May, 1838. Joseph died unmarried, in June, 1837. John Burnard never had any other issue.

John Burnard, and Elizabeth Brain, died respectively in the years 1830 and 1834. The widow died in November, 1842.

The present bill was filed by George Leach and Elizabeth his wife, against the infants George William Leach, and Elizabeth Bingham, and against the executors of the widow, for the purpose of obtaining a declaration of the rights of the parties interested in the £2500 stock.

Mr. Russell and Mr. Bayley, for the plaintiffs.

Mr. Simpkinson and Mr. Parry, for the defendants, the infants.

Mr. Cankrien, for the executors of the widow.

Mr. Bazalgette, for the surviving executor of the testator.

 1843.—*Leach v. Leach.*

It was observed at the bar, that in one view of the construction of the testator's will, the limitation to the issue of the children of John Burnard might be held void for remoteness, as John Burnard might have had other children born after the death of the testator; and that his not having in fact had any afterborn children, would make no difference: *Jee v. Audley*; (a) *Leake v.*

Robinson. (b) On the other hand, it was said that this [*498] question might possibly *be considered as concluded by the decision in the cause of "*Willats v. Burnard.*"

July 22nd—THE VICE-CHANCELLOR.—The bequest in question in this cause is worded with such curious perplexity, and open to such various arguments of construction, that any interpretation of it can scarcely be much better than conjectural. That which, after considering the whole will to the best of my ability, has appeared, and still appears to me, the least objectionable, I am ready to state, believing further consideration unlikely to produce any change in the view that I have taken.

It appears that the testator's brother, John, and three children of that brother (including Elizabeth, mentioned in the will,) were living when the will was made. I collect, also, and it is admitted, that not any other child of the brother was then living, or afterwards came into existence; and that all the persons mentioned in the bequest survived the testator, and, with the exception of the plaintiff, Mrs. Leach, (who is the only child now living of the testator's brother, John,) are dead, the testator's widow having died the last. It has, as I also collect, been decided in a former suit, that neither of the children of the testator's brother, John, nor any issue of either of those children, took any interest in possession under the bequest in question, until the death of the survivor of the annuitants mentioned in the will, and the testator's widow, who was the residuary legatee. That decision seems, expressly or by implication, to have acknowledged that there was nothing illegal in the bequest on the ground of remoteness.

It is also my opinion that, according to the true construction

(a) 1 Cox, 324.

(b) 2 Mer. 363.

1842.—Leach v. Leach.

of the instrument, there is no illegality. It appears to me, though not without some doubt, that by the expression, "Elizabeth Burnard, the eldest daughter of my said brother, John Burnard, and the other children of my said brother," the testator ought to be taken to have "meant only the three children, then [*499] living, of his brother, or at least not to have intended to include any child that might come into existence after the testator's decease. This also seems in effect to have been decided in the other suit: at least, so I understand it. I think, also, that neither of the three children can, upon the language used, be held to have taken more than a life interest in one-third of the fund, and that Elizabeth Burnard Bingham, and George William Leach (the children, respectively, of two of the three children of the testator's brother, John,) having been the only issue of any of the three children of the testator's brother, John, living at the widow's death, became, upon that event, entitled in possession to two-thirds of the fund, in equal shares, absolutely, Mrs. Leach being, as I have said, in my opinion, tenant for life of the other third, the title to which, subject to her life interest, I think cannot, or ought not, to be now declared. There must be liberty to apply on her death.

I repeat that I do not feel myself either confident in the correctness of this interpretation of the strangely-worded instrument before me, or able to suggest, on the whole, a better, consistently with the rule that words in a will are to be construed according to their ordinary sense and meaning, unless the testator has declared, or by the context shown, that he uses them otherwise, and consistently with what I apprehend to be another general rule, that a will is to be read with an inclination to believe, when it can be not unreasonably supposed, that the testator did not intend to transgress the law. I cannot read the gift to the issue of the three children of the brother, as being merely a gift to the children of those three children, or as a gift *per stirpes*; nor do I construe the mention of the age of twenty-one as operating a postponement of vesting, or the words "and to the survivors or survivor of them," at the end of the bequest, as referring to those who should live to attain that age.

 1843.—Marke v. Locke.

[*500]

*MARKE V. LOCKE.

1843: July 21st.

To a bill filed by A. against B., to recover a customary estate, all persons claiming adversely against B., under the custom, or by various constructions of the custom, are necessary parties; nor can A., with respect to those persons, avail himself of the provisions of the 23rd Order of August, 1841.

By articles dated the 24th April, 1769, made in contemplation of a marriage between Robert Marke and Grace Haddon, Robert Marke covenanted to surrender certain messuages and lands, parcel of the manor of Taunton Deane, of which he was seized in fee, according to the custom of the manor, to John Haddon and John Marke (brother of the settlor,) and their heirs, according to the custom of the manor, upon trust for the settlor and his intended wife, for their respective lives, and upon the decease of the survivor of them, upon trust to surrender the premises to the use of the issue of the marriage as therein mentioned and in default of issue of the marriage who should be living at the death of the survivor of the intended husband and wife, upon trust to surrender the premises to the use of the right heirs of the settlor for ever, according to the custom of the manor.

The property comprised in the articles was duly surrendered to the use of the trustees, and they were admitted to it. The marriage took effect, and Robert Marke, the settlor, died in 1779, leaving one child only of the marriage, Elizabeth, who died in 1812, intestate, and without having been married. The widow of the settlor married James Turner, and died in 1819, leaving her husband and two sons, John Haddon Turner, and James Turner, the younger, surviving her.

Shortly previous to her death, Elizabeth Marke, who had obtained a surrender of the estate from the party representing Haddon, the surviving trustee under the articles, surrendered them to her half-brother, John Haddon Turner, who, for valuable consideration, and with the consent of James Turner the younger, who then claimed to be customary heir, conveyed part of them to Thomas Southwood.

[*501] *In 1825, Susannah Locke, the youngest sister of Rob-

1843.—*Marke v. Locke*.

ert Marke the settlor, filed her bill against Southwood, alleging that the settlor had no other issue than his daughter Elizabeth, and that he left no brother surviving him, and that upon the death of Grace Turner, she, the plaintiff, as such youngest sister, became heiress of Robert Marke the settlor, according to the custom of the manor, and praying that Southwood, who had purchased with notice of the articles, might be decreed to convey to her the customary premises. In this suit, the defendant admitted the custom as stated by the plaintiff Susannah Locke, and upon the ground that she came within the description of right heirs in the ultimate limitation in the articles, (the heirs being considered to take by purchase,) she obtained a decree in her favor.(a)

In consequence of this decree, Susannah Locke, in September, 1831, filed her bill against Matthew and Sarah Colman,(b) for the purpose of recovering other of the customary lands comprised in the articles, of which the Colmans were purchasers under a title similar to that of Southwood. The defendants in this suit disputed the custom as asserted by Susannah Locke, and upon the trial of an issue directed for the purpose of trying her title as heiress according to the custom, a verdict was found against her.

In October, 1832, the original bill in the present suit was filed by John Marke against Susannah Locke, and against certain persons of the name of Mattock and Bush, devisees in trust under the will of Southwood, who died in 1830, praying that the plaintiff might be declared entitled to the customary hereditaments comprised in the articles, that the defendants might be decreed to convey to him the lands purchased by Southwood, and for further relief.

*The plaintiff, by his bill, submitted that, according to [*502] the true construction of the articles, the ultimate trust therein contained was for the benefit of the person or persons who would, at the time of the death of the survivor of Robert Marke and Grace his wife (afterwards Grace Turner,) have been the customary heir or heirs of Robert Marke, if he had at that

(a) See *Locke v. Southwood*, 1 Myl. & Cr. 411.

(b) See *Locke v. Colman*, 1 Myl. & Cr. 423.

1843.—*Marke v. Locke.*

time been seised to him and his heirs, as customary tenant of the premises, and had died so seised. And the plaintiff alleged that, as youngest son of Robert Marke, who was the youngest son of John Marke, who was the only brother of the settlor, he became and was at the decease of Grace Turner, and at the filing of the bill, heir, according to the custom of the manor, of the settlor.

Amongst other customs of the manor the plaintiff stated the following:—That if a man die seised to him and his heirs as customary tenant of any customary lands of inheritance within the manor, having a wife at the time of his death, then his wife shall inherit such land as next heir to such customary tenant, and shall be admitted to hold the same to her and her heirs for ever, according to the custom of the manor: also, that if a man die seised, &c., having at the time of his death more sons than one, and having no wife, and there be no issue of any deceased younger son, then the youngest surviving son shall inherit: and that if a man die seised, &c., having at the time of his death but one brother of the whole blood, and having no wife, and no issue, and there being no issue of any deceased younger brother of the whole blood, the brother shall inherit: also, that the customary heir of any deceased son, daughter, &c., of a person seised in fee as customary tenant, who would, if living, have been the customary heir of the tenant, shall be the customary heir of such tenant.

The cause came on for hearing before Lord *Cottenham*, C., in July, 1841, when it was objected that the customary heirs of Grace Turner, the heir at law of the settlor according to [*503] the course of the common law, and the customary *heirs of the widows of former customary heirs of the settlor, ought to be parties to the suit. These objections, or some of them, were allowed, and the cause stood over, with liberty to amend by adding parties.

The plaintiff then filed a supplemental bill against Susannah Locke, and the other defendants to the original bill, by which, after stating the objections which had been made for want of parties, the plaintiff alleged that the following persons claimed interests in the customary premises, viz., James Turner and others, devisees of James Turner, the younger, who was the customary heir of Grace Turner; John Marke,(3) the heir at law

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of John Marke,(1) and also of the settlor; Lucy Culverwell claiming as customary heir of Anne Marke, the widow of John Marke,(1) who married, secondly, a Culverwell; William and John Jennings, claiming as customary heirs of Mary Marke, the widow of Robert Marke,(2) who married, secondly, a Jennings; and William Marke, the heir at law of Robert Marke.(2)

The supplemental bill prayed that the persons so claiming interests, upon being respectively served with a copy of that bill, might be bound by all the proceedings in the cause; and in pursuance of the provisions of the twenty-third Order of August, 1841, all these persons were served with copies of the supplemental bill.

By the twenty-third Order of August, 1841, "where no account, payment, conveyance, or other direct relief, is sought against a party to a suit, it shall not be necessary for the plaintiff to require such party, not being an infant, to appear to and answer the bill. But the plaintiff shall be at liberty to serve such party, not being an infant, with a copy of the bill, whether the same be an original, or amended, or supplemental bill, omitting the interrogating part thereof; and such bill, as against such party, shall not pray a *subpœna* to appear and answer, but shall pray that such "party, upon being served [*504] with a copy of the bill, may be bound by all the proceedings in the cause."

The cause coming on again for hearing this day,—

Mr. *Freeling*, for the defendant, Susannah Locke, objected that the suit was defective for want of parties, the persons who had been served with copies of the supplemental bill not being, properly, parties to the suit. He insisted that they ought to have been made parties in the usual manner, and that the twenty-third Order of August, 1841, was not applicable. He cited *Barkley v. Lord Reay*.(a)

Mr. *Swanston* and Mr. *Kinglake*, for the plaintiffs, cited *Lloyd v. Lloyd*.(b) and contended that, at all events, as regarded

(a) 2 Hare, 306.

(b) Ante, vol. 1, p. 181.

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the heirs according to the common law, it was not necessary to do more than the plaintiff had done. It was not necessary for the common law heir to attend the determination of rights between the customary heirs.

THE VICE-CHANCELLOR.—It appears plain to me that but for the 23rd Order, these parties, or some of them, would have been necessary parties in the ordinary way, that is, parties who must have appeared and answered, or against whom, if within the jurisdiction, process of contempt would have been exhausted. I say that, independently of the decision of Lord *Cottenham*, who at one period of the cause appears to have determined that these persons, or some of them, were necessary parties to the bill.

The bill is filed by a plaintiff asserting an equitable title to a customary estate, of which the legal interest appears to be vested in Mattock and Bush, and praying the establishment of his equitable title, and the assurance to him of the legal estate. To

this property the plaintiff's title is claimed in respect [*505] of his alleged character of heir, according "to the custom,

of a former owner, at a particular period—not at his death, but another period. A lady named Locke, adversely claiming by a different pedigree, or different construction of the custom from that by which the plaintiff claims, is in possession, and has had that right adjudicated to her in another suit, to which the plaintiff is not a party.

There are, however, various constructions suggested of the custom; and it is contended that the custom has not provided for every possible case of descent, with reference to persons dying with or without a widow, and that the common law would supply a descent left unsupplied by custom. There are various claimants, who were in every sense absent from the record when the case was before Lord *Cottenham*, and Lord *Cottenham* directed that they, or some of them, should be here. All have been added as parties; but have not been served with a *subpœna*. Of course the suit has not proceeded to contempt against them, they have not answered, they do not now appear, and they are now within the jurisdiction.

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If the 23rd Order does not apply, this suit must stand over for want of parties; not only Mattock and Bush have an interest in the suit, and a duty, as trustees, which they may or may not be willing to perform, but Mrs. Locke, and those claiming under her, say that they ought to be delivered from these questions by one suit, and that this suit, as at present constituted, will not deliver them from these questions, parties who may contest their claim not being here. If the order, therefore, does not apply, the cause must stand over, not only upon the ground of Lord *Cottenham's* decision, but upon general principles and authority, the frame of the bill, and the nature of the circumstances.

But it is said that the 23rd Order applies. Now that order (whether it might or might not be usefully extended, I need not express, if I have formed any opinion) *is as [*506] follows: [His Honor here read the order, as far as the words "answer the bill."] I am of opinion, that these are words, not of direction, but of condition—and I think that they have been so construed by one of the Judges of this Court. If the condition is not fulfilled, the whole proceeding under the order is out of place, and Mrs. Locke may say that she is entitled to disregard it—that it is not necessary to pay any attention to an irregular and unauthorized proceeding. Assume that no account, no payment, no conveyance is sought against the other defendants, can it be said that no direct relief is sought against them? The plaintiff seeks to be established in respect of his alleged customary heirship; if so, he has a right to a conveyance from Mattock and Bush. They are trustees for one or the other of the contending parties; each of them may institute a suit against Mattock and Bush,—Mrs. Locke must be a party to every one of the suits, and the question may be re-agitated in each.

Upon the whole, I am of opinion, that if I were to overrule this objection, it would render the suit entirely useless to the plaintiff, and that the Lord Chancellor, or House of Lords, would most properly reverse the decision.

1843.—Richardson v. Larpent.

[*507] *WILLIAM JOHN RICHARDSON and six others, on behalf of themselves and of all other the proprietors or shareholders and partners of and in the Company or partnership, called the British Iron Company, hereinafter mentioned, except such of the said proprietors or shareholders and partners as are hereinafter named as defendants hereto, *Plaintiffs*; and Sir GEORGE G. de H. LARPENT and others, (*directors of the Company*,) ROBERT SMALL and others, (*trustees*,) and ROBERT SMITH, (*secretary*,) *Defendants*.

1843: July 25th.

The directors of a joint-stock company, consisting of upwards of 500 members, made certain calls, which the majority of the shareholders paid, but which six of them, alleging that the calls were fraudulently made, refused to pay, and filed their bill on behalf of themselves, and all other the shareholders, except the defendants, against the directors, trustees, and secretary of the company, praying for an account of the debts and assets of the partnership, a receiver, an injunction to restrain the defendants and all officers and servants of the company from dealing with the partnership property, an account of the debts and liabilities of the company, and to have the property applied towards the payment of its debts and liabilities:—*Held*, that some at least of the absent shareholders, who had paid up the disputed calls, ought to be made parties to the suit.[1]

Where a cause is set down for hearing, upon the defendant's objection for want of parties, under the 39th Order of August, 1841, the Court will assume, for the purpose of deciding that objection only, the defendant's answer to be true.

THE bill stated, that in the month of April, 1825, certain persons, in number 571, entered into partnership together for the purpose of working iron-mines in Great Britain, and of manufacturing and selling the ores and metals to be obtained and raised from such mines, and that the terms of such partnership were contained in a certain indenture of settlement.

The bill then set forth the indenture of settlement, which bore date the 28th of April, 1825, and which, amongst many other clauses, contained clauses to the effect that the parties thereto of the second part called proprietors and others who should thereafter

[1] 1 Coll. 241; 5 Hare, 112; 4 D. & War. 270; 2 Coll. 633; 15 Sim. 460; 14 Sim. 66.

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become proprietors as therein mentioned, should form a partnership, to be called "The British Iron Company," for the term of sixty-one years, unless sooner dissolved by agreement; that the capital of the Company should consist of £2,000,000 divided in 20,000 shares of £100 each; that the *man- [*508] agement of the Company should be confided to sixteen directors, to be chosen from among the proprietors; and that it should be lawful for a special general meeting, called for the purpose, from time to time to amend, alter, or annul, either wholly, or in part, any of the clauses of the deed, or of the existing regulations.

The bill then, after stating the appointment of the defendants as directors, trustees, and secretary, alleged that at a special general meeting of the proprietors, held on the 7th November, 1826, it was resolved, first, that the capital to be raised for the purposes of the Company should no longer consist of the sum of £2,000,000, divided into 20,000 shares of £100 each, but should be limited to the sum of £1,000,000, and should be considered as divided into 20,000 shares of £50 each; and secondly, that no proprietor should be liable to pay in the whole more than £50 in respect of any one share: that all the 20,000 shares of £50 each, were taken and subscribed for, and that, in the month of February, 1829 a call for the last instalment in respect of £50 on each share was made: that, at a meeting held on the 4th May, 1838, the directors procured some of the shareholders to pass resolutions, authorizing them to raise a loan of £300,000, and rescinding the two resolutions passed at the meeting of the proprietors on the 7th November, 1826: that on the 25th May, 1838, the directors, by fraud and misrepresentation, the nature of which was specially charged by the bill, procured some of the proprietors to confirm the resolutions of the 4th of the same month: that the plaintiffs and divers other partners and proprietors of the Company protested against the resolutions of the 4th and 25th May, and declared the same illegal and void: that, notwithstanding the £50 per share had already been called for, and, except as therein mentioned, paid up, the directors, on four several occasions mentioned in the bill, made four several calls of £5 each: that the defendants, and, through their

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[*509] *misrepresentation, the other shareholders, except the plaintiffs, had paid up these calls, but that the plaintiffs had protested against and refused to pay them, and actions had accordingly been brought against them to recover the amount of the calls.

The bill charged that the number of shareholders was so great, and their rights and liabilities so subject to change and fluctuation by death or otherwise, that it was not possible without the greatest inconvenience to make them parties to the suit; and that so to do, would render it impossible in fact to prosecute the suit to a hearing; and that the directors refused to allow the plaintiff's to inspect the books of the Company, or to discover to the plaintiffs who were the members of the Company. The bill further charged that all the shareholders had a common interest in having the property and effects and other assets belonging or due to the partnership duly got in or applied under the direction of the Court, in satisfaction of the debts due and owing from the partnership.

The bill prayed, amongst other things, that it might be declared that the resolutions of the 4th and 25th May, 1838, were fraudulent and void; that the actions for the calls might be restrained by injunction; that the directors might be declared personally liable for all acts, dealings, and transactions made or done in consequence of their fraudulent misrepresentation, and might be decreed to make good all losses occasioned thereby; that an account might be taken of all the partnership property, and that such part of the partnership property as required to be sold, might be sold; for a receiver; for an injunction to restrain the defendants and all the officers and servants of the Company from in any manner dealing with the partnership property; for an account of the debts and liabilities of the Company; and to have the property of the Company properly applied towards payment and satisfaction of its several debts and liabilities.

[*510] *The defendants, in a schedule to their answer, set out the names of all the present shareholders (upwards of 500 in number,) who had paid up the additional instalments called for on their respective shares; and by their answer they submitted, that these persons were necessary parties to the suit.

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They denied the various charges of fraud and misrepresentation contained in the bill.

The cause was set down by the plaintiffs under the 39th Order of August, 1841, to be heard on the objection for want of parties only.

Mr. *Russell*, Mr. *Wigram*, and Mr. *Roundell Palmer*, for the defendants.—For the purpose of sustaining the objection for want of parties under the 39th Order, the Court will assume the truth of the answer as to that particular point. Then these plaintiffs, not having a common interest with the absent defendants in the relief which they seek, cannot be permitted to sue on behalf of themselves and all other shareholders: *Bainbridge v. Burton*.(a) Some of the shareholders having paid, and others not having paid, the additional calls, it is impossible to say that the whole of the rights and interests of the Company are represented by one of these classes only, especially a class which is in the minority. How can a class of individuals so circumstanced and in a minority take the whole concern into their own hands, and enforce a general account and dissolution (for they virtually ask a dissolution) behind the backs of the majority? *Longe v. Younge*.(b) *Walworth v. Holt*.(c) *Newton v. Lord Egmont*.(d) *Jones v. Garcia del Rio*.(e) The cases in which parties have been allowed to sue on behalf of themselves and others are these: first, cases in which some have been allowed to sue on behalf of all having a manifestly common interest *against [*511] individuals for the purpose of enforcing a personal liability to the partnership, or of relieving the partnership from a liability to those individuals. *Cockburn v. Thompson*.(f) *Hichens v. Congreve*.(g) *Walburn v. Ingilby*.(h) *Small v. Atwood*.(i) *Taylor v. Salmon*.(k) *Preston v. Grand Collier Dock Company*.(l) Secondly, cases in which some have been allowed to sue on behalf of all the partners having a manifest common interest in the relief sought, against all having an opposite interest

(a) 2 Beav. 539. (b) 2 Sim. 369. (c) 4 Myl. & Cr. 619. (d) 5 Sim. 130.

(e) Turn. & Russ. 297. (f) 16 Ves. 321. (g) 4 Russ. 562.

(h) 1 M. & K. 61. (i) 1 You. 407. (k) 4 M. & C. 134. (l) 11 Sim. 327.

 1843.—Richardson v. Larpent.

and the public officers, for the collection and administration of the partnership property by the Court: such is the case of *Walworth v. Holt*, which would be exactly the converse of this case, if the persons named in the defendant's schedule were made parties. Thirdly, cases in which individual partners have sued on their own behalf, for their separate rights, other individuals, against whom they make out a case of liability to them, on the ground of fraudulent dealing with their interest, or otherwise. *Mare v. Malachy*,^(a) *Sedden v. Connell*,^(b) *Turner v. Hill*,^(c) *Brown v. De Tastet*.^(d) There are also cases in which the Court admits of representative defendants; but it is on the ground that all have a common interest as members of one class, and for the fair contest and decision of the litigated question. *Adair v. The New River Company*,^(e) *Pearce v. Piper*,^(f) *Caldecott v. Caldecott*.^(g) The case of the plaintiffs falls within none of these classes: they are seeking, in a bill for an account and general dissolution, to represent interests inconsistent with their own. Nor can a receiver of the partnership property be [*512] granted in the absence of the majority of the partners: *Turner v. Borlase*.^(h)

Mr. *Simpkinson* and Mr. *Shapter* for the plaintiffs.—It is clearly not necessary, in the case of a partnership consisting of so many partners as there are here, that all should be parties to the suit; the only question is what number of each class should be partners: *Atwood v. Small*.⁽ⁱ⁾ [The *Vice-Chancellor*.—That decision is quite consistent with the proposition, that where you have parties enough, for substantial purposes, to represent all the partners, you need not have every individual partner before the Court.] We submit that the plaintiffs and defendants in this case sufficiently represent the Company: *Bromley v. Smith*,^(k) *Meux v. Maltby*.^(l) We say, first, that the directors had no right to make the calls: secondly, that, when they were made, the partners who paid them were induced to do so by misrepresentation. To allow the objection would be tantamount to a

(a) 1 Myl. & C. 559.

(b) 10 Sim. 58.

(c) 11 Sim. 1.

(d) Jac. 284.

(e) 11 Ves. 429.

(f) 17 Ves. 1.

(g) Cr. & Ph. 183. (h) 11 Sim. 20.

(i) 4 Jur. 239.

(k) 1 Sim. 8.

(l) 2 Swan. 277.

 1843.—Richardson v. Larpent.

complete denial of justice, where the shareholders are so numerous. But it is said, that you need not make all, but some, only, of them parties: what particular number, however are necessary for the purpose of this suit is not suggested; and had any number short of the whole been made parties, the defendants would have objected. Besides, the plaintiffs are ignorant who the other shareholders are. *Wallworth v. Holt*.

THE VICE-CHANCELLOR.—This is the case of a very numerous unincorporated trading company, between the members of which there is a schism, one division taking one view of certain important proceedings relating to their common interest, the other a different view, and each division comprehending, as it appears, such a number of *persons as to render it [*513] substantially impracticable to conduct a suit comprising all the individuals of either class.[2] The bill is filed by the plaintiffs on behalf of themselves, and all other the members of the partnership. It may be, that as far as the plaintiffs are concerned, it is properly filed on behalf of themselves and those members who take the same view of the matters in dispute as they do, and not properly filed on behalf of all the members; but upon this it is not necessary to give an opinion. In regard to the defendants, none of the dissentients from the view of the plaintiffs are here in that character. It is true that some are

[2] As to dispensing with parties by reason of their number, see *Moxley v. Alston*, 1 Phillips, 799, note 1; *Fordyce v. Bridges*, 2 Phillips, 507; *Hallett & Davis v. Hallett et al.*, 2 Paige, 15; *Mann v. Butler*, 2 Barb. Ch. R. 362; *Wendell v. Van Rensselaer*, 1 Johns. Ch. R. 349; *Walburn v. Ingilby*, 1 Myl. & K. 61; *Richardson v. Hastings*, 7 Beav. 323; *Harvey v. Harvey*, 4 Beav. 215; *Coleman v. The Eastern Counties R. R. Co.*, 10 Beav. 1; *Manning v. Thesiger*, 1 Sim. & Stu. 106; *Hawkins v. Hawkins*, 1 Hare, 546; *Colt v. Lasnier*, 9 Cowen, 320; *Attorney-General v. Welsh*, 4 Hare, 578; *West v. Randall*, 2 Mason, 181; *Powell v. Wright*, 7 Beav. 499, 50; *Brinkerhoff v. Brown*, 6 Johns. Ch. R. 139. That where the grievance complained of is common to a body of persons too numerous to be all made parties, the Court will permit one or more to sue in behalf of all; but in such cases, the relief which is prayed must be one in which the parties whom the plaintiff represents or professes to represent, have all of them an interest identical with the plaintiff, see *Moxley v. Alston*, 1 Phillips, 798; *Taylor v. Salmon*, 4 Myl. & Cr. 134; *Wallworth v. Holt*, 4 Myl. & Cr. 619; *Mallows v. Hind*, 12 Wheat. 193; *Arredondo*, 1 Paine, 410; *Hallett v. Hallett*, 2 Paige 19.

1843.—Richardson v. Larpent.

present; but all present are directors or trustees—persons to whom, more or less, are committed the general government and administration of the Company. They are all, therefore directors or trustees, more or less, for all, and, sustaining that character, cannot, it may fairly be supposed, exercise so fully and freely the right and power of opposing the plaintiffs' views, as those persons may be considered likely to be capable of doing, who owe no duty to the plaintiffs, beyond the simple and ordinary duty of partners.

The points on which the partners are divided are—first, the time, manner and circumstances of dissolving the Company; secondly, as to the question whether the capital has been rightly increased, that is to say, whether the plaintiffs can be compelled to pay to the parties, who are in the situation of governors of the concern, more than a certain specified amount of capital. One object of the bill is to obtain a dissolution, another, more plain object, to exempt the plaintiffs from the liability to contribute to a further capital. But the larger body of the shareholders are those who have actually contributed that increased amount of capital which is in dispute. These persons, it being at least very doubtful whether, having contributed the money, they can recover it back again, have plainly, as it seems to me, an interest that the plaintiffs should farther contribute; but the plaintiffs, desire that they the plaintiffs should be [*514] *freed from contribution. It is too much to say that questions so important should be decided without the presence of at least an adequate number to maintain each side. But, as I have already said, only the directors and trustees are here as defendants—men who must be restricted in the mode and form of their opposition, because they owe the plaintiffs a duty beyond that which exists simply between partner and partner. They are officially obliged to have an equal mind towards the shareholders, and cannot properly be considered as representing an opposition.

Considering the nature of the questions agitated on this bill, and taking the answer to be true for this purpose only, I must say that the suit is defective for want of parties. My present impression is not that, in every case where a dissolution is sought,

 1843.—Richardson v. Larpent.

all the individual partners must of necessity be present. Generally the rule may be so, but I can conceive a case where it would be most important to the interest of the plaintiffs, and their right, to have the partnership dissolved, and yet, though the legality of the partnership were recognised by law, it might be impossible in substance to obtain a decree for dissolution, if it were necessary to have all the parties present. Such a state of things could hardly be permitted to exist by any court of justice, or in any civilized country, nor am I aware that any Judge has gone the length of saying that it should or does exist. I do not say that all the parties dissentient should be here; but there ought to be a sufficient number to discuss the present questions freely and unrestrainedly; or, at all events, with more freedom and propriety than they can be discussed by the defendants now on the record.

DECLARE, that on the present state of the pleadings, and upon the assumption that the case stated by the answer is true, the suit is defective for want of parties; and with that declaration direct this matter to stand over to the hearing of the cause, without prejudice to any question, or to the plaintiffs' right to amend the bill. Reserve the costs, with liberty to apply.

*COOPER v. HEWSON.

[*515]

1843: July 22nd.

Solicitor in a suit, who had been discharged by the client, but had not delivered his bill of costs within the proper time; ordered under the circumstances of the case, to deliver the papers and documents in his possession relating to the suit (without prejudice to his lien) to the new solicitor.

THIS was a motion on the part of the plaintiff, that his former solicitors in the suit might be ordered, within a week after service of a copy of the order to be made on the motion, to deliver to the present solicitors all abbreviated and office copies of papers and documents, and also all letters and copies of pleadings, briefs, and all other papers and documents, and copies of letters, relating to or concerning the suit, "or which may or might have been used in relation thereto," or in the conduct

 1843.—Cooper v. Hewson.

thereof, and belonging to the plaintiff, in the possession, custody, or power of the former solicitors; the plaintiff and his present solicitors undertaking to receive such documents and papers without prejudice to any lien which the former solicitors might have thereon, and to abide by such order as the Court might make in relation thereto, and not to part with the same respectively, without the consent of the former solicitors, or the order of the Court, &c.

The plaintiff had discharged his former solicitors, and had obtained the common order for the delivery within a month, and the taxation of, their bill of costs; but they had allowed the month to elapse without having delivered their bill. The plaintiff had paid all former delivered bills, and there was a balance of about 900*l.* in his favor on the account current between him and the former solicitors

Mr. *Simpkinson*, for the motion.

Mr. *Cooper*, for the former solicitors, said, that when the solicitor discharged his client, the latter, no doubt, had a right to have the papers delivered up to him; but that a client had not the same right when he discharged his solicitor. He [516] cited the observations of Lord *Cottenham* in *Bozon* v.

Bolland ;(a) also *Heslop* v. *Metcalf*,(b) and the cases there cited; *Cane* v. *Martin* ;(c) *In re Smith* ;(d) *Moyr* v. *Mudie* ;(e) *Richards* v. *Platel* ;(f) *Steele* v. *Scott*.(g)

THE VICE-CHANCELLOR.—Without questioning any of the authorities which have been cited, but assuming the right of the solicitor to his lien to be equivalent to a right by contract, and to be protected by law, it is also part of that law and of the contract, that the solicitor should be ready within a month with his bill of costs. Both are parts of the same law or contract, the law assuming, in the abstract, a month to be sufficient time for the delivery of a bill of costs. It may be that, in particular cases,

(a) 4 Myl. & C. 358. (b) 3 Myl. & C. 183. (c) 2 Beav. 584. (d) 4 Beav. 309.
(e) 1 S. & S. 282. (f) Cr. & Ph. 79. (g) 2 Hog. 141.

1843.—Cooper v. Hewson.

further time may reasonably be required ; if so, it is an exemption from the general law, for the convenience and benefit of the solicitor, and the client ought not, under such circumstances, to suffer ; especially where the papers required for conducting a cause are not the whole of the papers in the solicitor's possession, and where every delivered bill has been paid, and there is a balance in the solicitor's hands towards payment of the undelivered bill.

ORDER made in terms of the notice of motion, omitting the words in inverted commas. Costs reserved. Time for delivery of the bill enlarged by consent.

*GREENE V. POTTER.

[*517]

1843: July 26th.

Testator devised his estate at E. to trustees, upon trust to apply the rents for the maintenance and support of B. till she should attain the age of twenty-five years, or marry with consent, and to lay out the surplus of such rents in Government securities, that the same might accumulate for the uses and purposes of his will ; and from and after the said B. should attain twenty-five, or marry with consent, then to pay her the whole of the rents for her life ; and after her decease, upon trust for her children. The testator then gave his estate at I. to the same trustees, upon trust, in case the said B. should live to attain twenty-five, or marry with such consent as aforesaid, to permit her to occupy and enjoy and receive the rents of that estate for her life ; and after her decease, upon trust for her children, in the manner before mentioned. Provided, that, in case B. should marry without consent, the testator revoked all the devises and bequests in favor of her and her issue. All the residue of his real and personal estate, and likewise his estate and premises thereinbefore devised for the benefit of B., in case she should die under twenty-five, unmarried, and without issue, the testator devised and bequeathed to the trustees in trust for X., Y., and Z. B. attained twenty-five, and married with consent. Between the death of the testator and her attaining twenty-five there was an accumulation of the surplus rents of the E. estate, after providing for her maintenance, and an accumulation of the rents of the I. estate :—*Held*, that she was entitled for her life to the income of the former accumulation, and absolutely entitled to the latter accumulation.

H. POTTER, by his will, devised as follows : I give and devise unto my friends John Bourne and William Hill all those my dwelling-houses or tenements, and all my closes, lands, and here-

1843.—Greene v. Potter.

ditaments, situate at Long Eaton, in the county of Derby, now in the occupation of Luke Shepherd, &c., to hold my said mesuages, &c., and every of them, with their and every of their appurtenants, unto and to the use of the said John Bourne and William Hill, their heirs and assigns, in trust that they, or the survivor of them, or his heirs, do and shall receive and take the rents, issues, and profits of the said premises, and pay, apply and appropriate the same, or such part thereof as they in their discretion shall think proper and necessary, for the support, maintenance, and bringing up of my natural child Betty Phillips, until she shall attain the age of twenty-five years, or marriage with such consent as hereinafter is mentioned, and to lay out and invest any surplus of such rents, issues, and profits upon government or real security, at interest, in order that the same may accumulate for the uses and purposes of this my will; and from and after the said Betty Phillips shall attain the said age of twenty-five years, or be married with such consent as aforesaid then upon trust to pay to or permit the said Betty Phillips to receive and take the whole of the rents, issues, and profits of the said trust estate and premises for the term of her natural [*518] life, for her own sole and separate use, *benefit, and advantage, and not to be subject or liable to the debts, control, or engagements of any husband she may marry with such consent as before alluded to; and from and after the decease of the said Betty Philips, then upon trust for all or every and such one or more of the lawful issue, child or children of the said Betty Philips, in such parts, shares, and proportions, manner and form as the said Betty Philips, notwithstanding her coverture, shall by any deed or instrument in writing, duly executed and attested, or by her last will and testament in writing, or by any codicil thereto executed and attested according to law, give and devise or direct, limit and appoint the same, or any part thereof, and in default of such gift or devise, direction, limitation, or appointment as to the whole or any part of such premises, in trust for all and every the issue, child and children of the body of the said Betty Phillips, lawfully to be begotten, equally, share and share alike, &c. Also I give and devise unto my said trustees my house and premises at Ilkeson, in the occupation of my bro-

1842.—Greene v. Potter.

ther Thomas Potter, together with the two cottages occupied by T. Sudbury and G. Dean, to hold the same unto and to the use of my said trustees, their heirs and assigns, upon trust, in case the said B. Phillips should live to attain the age of twenty-five years, or marry with such consent as hereby required, to permit the said B. Phillips to occupy and enjoy the said last-mentioned premises, or receive the rents and profits thereof for her natural life, for her separate use and benefit as aforesaid, and after her decease, then upon trust for her issue and children, (if any,) in the manner and subject as before-mentioned with respect to the other property so given to my said trustees. Provided always, and my mind and will is, that in case the said Betty Phillips shall marry without the consent and approbation of my trustees for the time being, then I revoke and make void all and every the devises and bequests contained in this my will to or in favor of *the said Betty Phillips and her issue. And [*519] as to, for, and concerning all the rest, residue, and remainder of my messuages, lands, tenements, hereditaments and real estate, as well freehold as copyhold, and also my term and interest in the collieries now carried on by me in partnership with my said brother Samuel and Messrs. John and G. Bourne, together with my household goods and furniture, farming stock, ready money, and securities for money, and all other my personal estate, property, and effects, whatsoever and wheresoever; and likewise my estate and premises hereinbefore devised to my said trustees for the benefit of the said Betty Phillips, in case she shall happen to die under the age of twenty-five years, unmarried, and without issue as aforesaid, I give, devise, and bequeath them and every of them, with their and every of their rights, members, and appurtenants, unto and to the use of the said J. Bourne and W. Hill, their heirs, executors, administrators, and assigns, according to the nature and tenor of such estates respectively, upon trust, that they, my said trustees, or the survivors of them or his heirs, do and shall, as soon as conveniently may be after my decease, sell and dispose of such parts of my said last-mentioned estates as may be of a saleable nature; and as to the money arising therefrom, after payment of my just debts, funeral and testamentary expenses, in trust to put and place the same on good

and government or real securities, at interest, and to pay and apply the interest, dividends, and annual proceeds thereof, after paying the annuities hereinbefore by me given unto and equally amongst my brothers, Thomas Potter, J. R. Potter, and George Potter, and my sister Mary, wife of A. M. Barker, for their respective natural lives, &c., [with a reversionary bequest to their children.] And lastly, I nominate and appoint said J. Bourne and W. Hill, and my said brother Thomas Potter, joint executors of this my will and testament.

[*520] *At the testator's death, Betty Phillips, the legatee named in his will, was an infant of the age of six years. She attained the age of twenty-five on the 30th April, 1842, and afterwards, with the consent of the trustees of the will, married one Greene, a defendant in this suit.

The object of the bill was to obtain a decree of the Court for payment to the plaintiff, Mrs. Greene, of the accumulated surplus rents arising from the estates in the testator's will first devised, after allowing for her maintenance during her minority, and also of the accumulated rents of the estates thereby secondly devised, from the death of the testator to the time she attained twenty-five.

Mr. *Wigram* (with whom was Mr. *W. Harrison*) for the plaintiff.—The devise, in this case, is not distinguishable from those in *Phipps v. Akers*,^(a) and *Phipps v. Williams*.^(b) [The Vice-Chancellor referred to *Gibson v. Lord Montfort*.^(c)] In the second devise, in this case, the gift is to the trustees "upon trust, in case the said B. Phillips should live to attain the age of twenty-five, or marry with consent," to permit her to occupy and receive the rents for her natural life, with a proviso, that the estate shall go over if she dies under twenty-five, unmarried, and without issue. The words "in case" will not prevent the gift from vesting. In *Edwards v. Hammond*,^(d) the word used was "if." In *Doe d. Hunt v. Moore*,^(e) the word was "when." From the gift over, the Court will infer that the prior devisee takes a vested

(a) 6 Jurist, 745.

(b) 5 Sim. 44; 3 Cl. & F. 665.

(c) 1 Vez. sen. 486.

(d) 3 Lev. 132; 1 N. R. 374, n.

(e) 14 East, 601.

 1843.—*Greeno v. Petter*.

interest, and, if so, she will take the rents. In the first devise, there is a trust for the accumulation of rents ; but upon the whole, it is like *Boraston's Case*.(a) [The *Vice-Chancellor*.—Here are the words “uses and purposes of this my will.”] If the surplus rents *are to sink into the estate, you have not [*521] the uses and purposes expressed ; if they go to the tenant for life, you have.

Mr. *Jervis* for the trustees.

Mr. *Swanston* and Mr. *Renshaw* for the residuary legatees.—The surplus is expressly directed to accumulate. That accumulation is the subject of the residuary clause. No light can be got from the cases as to the construction of the instrument here, which is peculiar. With respect to the first devise, the word “whole” shows that the testator intended to give the plaintiff, at her age of twenty-five, a different interest in the rents from that which she was to have before that period. And this construction, is strengthened by the direction for maintenance out of the fund. As to the second devise, the words “in case” are stronger than the corresponding words in the cases which have been cited in *Akers v. Phipps*. Lord *Brougham* considers *Doe v. Moore* as of very questionable authority. *Genery v. Fitzgerald*.(b)

THE VICE-CHANCELLOR.—With regard to the second devise, (taking that first into consideration,) the testator gives the Ilkeston estate to trustees, upon trust, in case Betty Phillips should live to attain the age of twenty-five years, or marry with such consent as by the will is required, to permit her to occupy and enjoy that property, or receive the rents and profits thereof for her natural life, for her separate use and benefit, and after her decease, then upon trust for her issue &c. Now, in construing this gift, it must be recollected, that in two subsequent parts of his will, he makes these provisions :—“And my mind and will

(a) 3 Rep. 19.

(b) Jack. 468.

1843.—Greene v. Potter

is, that in case the said Betty Phillips shall marry with-
[*522] out the consent and approbation of my trustees *for the
time being, I revoke and make void all and every the
devises and bequests contained in this my will, to or in favor
of the said Betty Phillips and her issue." And in the gift of the
residue he says—"And likewise my estate and premises herein-
before devised to my said trustees for the benefit of the said
Betty Phillips, in case she shall happen to die under the age
of twenty-five years, unmarried, and without issue, I give, de-
vise, and bequeath them," &c., devising them to his trustees, up-
on trust to sell, and so forth. Taking, therefore, the disposition
of the Ilkeston estate in connection with these two gifts over, or
limitations, and comparing it with the special provision contain-
ed in the former part of the will as to the intermediate rents of
the estate before given, I think that, upon *Boraston's Case*, the
case of *Edwards v. Hammond* and other cases of that description,
the gift to Betty Phillips of the Ilkeston estate is immediate in
equity, and that all the rents, from the testator's death, belong
to her.

With respect to the first devise, there seems to me to be more
difficulty; but my present impression is, that I must upon this
will, on account of the different language in different parts of it,
hold, that the testator intended a different course to be taken
with regard to the intermediate rents of the Long Eaton estate,
and the intermediate rents of the Ilkeston estate. With regard
to the former, all that the testator gives his daughter during the
period previous to her attaining twenty-five, or marrying with
consent, is only what may be sufficient for her maintenance, and
the surplus is directed to be laid out upon government or real se-
curities, at interest, in order that the same may accumulate for
the uses and purposes of his will. I think that she is excluded
by this language from the surplus, if there be nothing more in
the will, and that it would probably fall into the residue, unless
given in some other manner. Then we come to this
[*523] provision:—"And from and after the said Betty *Phil-
lips shall attain the said age of twenty-five years, or be
married with such consent as aforesaid, then upon trust to pay
to, or permit the said Betty Phillips to receive and take the

1843.—*Greene v. Potter*

whole of the rents and profits of the said trust estate and premises, for the term of her natural life," &c. Now the words "said trust estate and premises" are large enough to include the accumulations, if the proper interpretation of the whole will renders it right to consider that the testator so meant. I repeat that I think these words not confined to land. It is not probable that, having given this estate to this devisee, he would give away from her and her descendants the savings of the income which might be made during her minority. That was a possible, but not a probable, intention on the part of the testator. Considering, then, that the words he has used are sufficient of themselves to execute an intention to give her an interest in those savings, let us look at the language of the residuary bequest where he gives all the rest, residue, and remainder, &c. [His Honor here read the residuary bequest.] Having present to his mind specifically, when he is disposing of the residue, the particular property which he gives to his daughter, what does he give to the residuary legatees? Mentioning the property, he gives them nothing of it, or from it, but this—namely, the estate thereinbefore devised for the benefit of his daughter, "if she shall die under the age of twenty-five years, unmarried and without issue." This is a positive recession from the subject as regards the residuary legatees; showing that he would not give the estate without also giving the income of the accumulation during minority. Combining this with the expression, "the whole of the rents and profits of the said trust estate and premises," which, as I before observed, is sufficient to cover this fund, I am at present of opinion that it is consistent with the proper interpretation of the will, to give this lady, for life, the income arising from the accumulations of the rents of *the Long [*524] Eaton estate, with liberty, at her death, for any persons to apply; and my present impression also is, that she is absolutely entitled to the accumulations of the rents of the Ilkeston estate; I will, however, re-peruse the will, and state on a future day whether I remain of the same opinion.

July 29th.—On this day his Honor said, that he was unable

1843.—*Marke v. Locke*.

to arrive at any other conclusion upon the case, than that which he had already stated.

DRANT V. VAUSE.

1843: July 24th.

Guardian *ad litem* to infant defendants, resident within the jurisdiction, appointed without a commission.[1]

Mr. AMPHLETT moved that K. might be appointed guardian *ad litem*, without a commission for that purpose, to the three infant defendants, in the room of the guardian *ad litem*, who had died since the institution of the suit. Since the death of the guardian, K. had married one of the infant defendants. The parties were all resident within the jurisdiction.

Mr. *Thomas Turner*, for the plaintiff, consented to the application.

THE VICE-CHANCELLOR said that, upon a proper affidavit, he saw no objection to making the order, but thought that the application had better be made to the Lord Chancellor.

July 27th.—*Amphlett* then applied to the Lord Chancellor, citing *Smith v. Palmer*,^(a) *Shuttleworth v. Shuttleworth*.^(b)

THE LORD CHANCELLOR made the order, subject to the production of an affidavit, that K. was a proper person to be appointed guardian, and had no interest adverse to that of the defendants.

(a) 3 Beav. 10.

(b) 2 Hare, 147.

[1] That it is not the practice of the Court to appoint a person resident abroad a guardian *ad litem*, as the Court would have no power to enforce obedience to its orders, see *Lady Hartland v. Atcherley*, 7 Beav. 53. That a guardian appointed by the Court should reside within its jurisdiction, see 1 Phillips, 34, note 1, and the cases there cited.

1843.—Meredith v. Farr.

*MEREDITH V. FARR.

[*525]

1843: July 19th.

Testator bequeathed one moiety of a sum of money to the children of A., and the other moiety to the children of B. At the testator's death, A. had six legitimate and two illegitimate children, and B. had one legitimate and three illegitimate children, and the legitimate children of B. were named in the will in relation to another bequest:—*Held*, that the legitimate children of A. were entitled to one moiety of the fund, and all the children of B. whether legitimate or not, were entitled to the other moiety.

Testator bequeathed a sum of money to the children of A., lawfully to be begotten, including her daughter E., aged about fourteen. E. was illegitimate, and A. had no other child of that name:—*Held*, that E. was entitled to share in the fund.

WILLIAM FARR, by his will, dated the 18th January, 1825, after directing the trustees therein named to convert his personal estate into money, and to set apart and invest in their names in the funds various sums of £300 therein mentioned, ordered, that, as to one of the said sums of £300, and the stocks, funds, and securities in or upon which the same should be laid out and invested, his trustees should stand possessed thereof upon trust to pay the interest, dividends, and annual produce to his daughter, Elizabeth Williams, for her life, and, after her decease, the said sum of £300 to be equally divided between and amongst the children of his daughters, Mary Jones, and Catherine Phillips, that is to say, one moiety, or half part thereof, between or amongst the children of his said daughter Mary Jones, to be divided between them in equal portions, share and share alike; and the other moiety or half part thereof, between and amongst the children of his said daughter Catherine Phillips, in equal portions, share and share alike, on their respectively attaining the age of twenty-one years, and payable to them respectively within twelve months after his decease, in case they should then have respectively attained the age of twenty-one years; but in case they should then respectively be under the age of twenty-one years, then immediately after they should respectively attain that age. And as to one other of the said sums of £300, and the stocks, funds, or securities in or upon which the same should be

1843 —Meredith v. Farr.

laid out and invested, upon trust, to pay the interest, dividends, and annual produce thereof, to his daughter Catherine, the wife of James Phillips, deceased, during her life, and, after her decease, then the said sum of £300, and the stocks, funds, and securities in or upon which the same should be laid out [*526] or invested, and the interest, dividends, *and annual produce thereof, to be in trust for all and every the children and child of his said daughter Catherine Phillips, namely, William, John, Angelina, and Sarah Phillips, to be interests vested in them respectively, on their respectively attaining the age of twenty-one years, &c. [with a clause of survivorship and accruer in the event of any not attaining that age.] And as to one other of the said sums of £300, and the stocks, funds, and securities in or upon which the same should be laid out and invested upon trust to pay the interest, dividends, and annual produce thereof, to his said daughter Mary, the wife of Phillip Jones, during her life, for her sole and separate use and benefit; and after the decease of the said Mary Jones, then the said sum of £300, and the stocks, funds, and securities in or upon which the same should be laid out and invested, and the interest, dividends, and annual produce thereof, to be in trust for all and every the children and child lawfully to be begotten of his said daughter Mary, and including her daughter Elizabeth, aged about fourteen, to be interests vested in them respectively, as they should attain the age of twenty-one years, &c. [with a clause of survivorship and accruer in the event of any of them not attaining that age.]

The testator died soon after the date of the will.

It appeared from the Master's report in the cause, that the testator's daughter, Mary Jones, married, in 1815, Philip Jones, and had issue by such marriage six children, all of whom, except one, who was born after the testator's death, were living at the date of his will, and of his death; that Mary Jones had besides these children two other children, who were born previously to her marriage with Philip Jones, and not in lawful wedlock, and were living at the time of the testator's death, namely, Elizabeth, the wife of Charles James, and Keziah, the wife of J. P. Harris; and the Master found, that Elizabeth James was the person

 1843.—*Meredith v. Farr.*

whom the testator meant under the description in his will, "and including her daughter Elizabeth, aged [*527] fourteen;" that Mary Jones died in 1837, and her husband in the year following: that the testator's daughter Catherine married James Phillips, who died in 1814: that she had issue of such marriage one child only, William Edward Phillips; that since her husband's death she had had three children, John, Angelina, and Sarah, all of whom were living at the date of the testator's will, and of his death.

Upon the cause coming on to be heard for further directions, the question was, what interest, if any, the illegitimate children of the testator's daughters took under the will.?

Mr. *Hullett*, for the three illegitimate children of Catherine Phillips, submitted, that as they were all named in the second bequest of £300, they were entitled to share with William Edward Phillips, the moiety of the first mentioned bequest of £300, given to the children of Catherine Phillips.

Mr. *Lloyd*, for the two illegitimate children of Mary Jones, claimed a similar benefit for those children with respect to the other moiety of the first-mentioned £300. He observed, that, at all events, Elizabeth must be considered as a child of Mary Jones. *Gill v. Shelly*.(a)

THE VICE-CHANCELLOR.—In the case cited there were but two children, the parent was dead, and the word was plural. There was a designation of the persons to take. In this case, I think it would be too dangerous to let in the two illegitimate children of Mary Jones under the first bequest. The consequence is, that Keziah is altogether excluded; but the four other illegitimate children, whose names are given, take interests under the will.

*DECLARE that, according to the true construction of the will of the [*528] testator, William Farr, the six children of his daughter Mary Jones, born in lawful wedlock, named in the Master's report, and William, John, Angelina, and Sarah Phillips, the four children of Catherine Phillips named in the Master's report,

 (a) 2 Russ. & M. 336.

 1843.—Meredith v. Farr.

are entitled in equal moieties to the legacy of £300, by the will of the said testator, bequeathed in trust for his daughter Elizabeth Williams, now the defendant Elizabeth Edwards, the wife of the defendant Thomas Edwards, subject to the life interest therein of the said defendant Elizabeth Edwards; and declare, that the plaintiffs, William, John, Angelina, and Sarah Phillips, are entitled to the legacy of £300, given by the will of the said testator in trust for his daughter, Catherine Phillips, for her life, as therein mentioned, subject to the life interest therein of the said Catherine Phillips, and subject to the share of the said Sarah Phillips in the same last-mentioned legacy, being devested in favor of the said William, John, and Angelina Phillips, in the event of the said Sarah Phillips dying under the age of twenty-one years: And declare, that according to the true construction of the will of the said testator, all the children of his daughter Mary Jones, living at the death of the said testator, and born since in lawful wedlock, and also the defendant Elizabeth James, the wife of the defendant Charles James, found by the said Master's report to be an illegitimate daughter of the said Mary Jones, are entitled to the legacy of £300, given by the will of the said testator, to his daughter Mary Jones for her life, subject to the interests of such of the same last-mentioned children as have not attained the age of twenty-one years, being devested in the event of such children, or any of them, dying under the age of twenty-one years, in favor of such of the same children as have attained, or shall hereafter attain the age of twenty-one years: And declare, that the defendant Keziah Harris, the other illegitimate child of the said Mary Jones mentioned in the said Master's report, is not entitled to participate in the said last-mentioned legacy of £300.

[*529]

*NOAD v. BACKHOUSE.

1843: July 21st.

Upon an application for substitution of service of subpoena to appear and answer, on the general solicitor of a defendant who was out of the jurisdiction, the Court, in the existing state of authorities on the subject, referred the applicant to the Lord Chancellor.

Receiver appointed of a Government pension, the trustee being out of the jurisdiction.

THE defendant, Backhouse, was trustee of a Government pension for the plaintiff, who some time since filed a bill against him to compel payment of it. To that bill he appeared by Messrs. B. & B. as his solicitors; but it was afterwards dismissed against him, the plaintiff understanding that if that course were taken, she would receive payment. Upon the plaintiff again applying for payment, after the dismissal of the bill, the defendant, through Messrs. B. & B., refused the application,

1843.—*Noad v. Backhouse.*

alleging that he could not pay the pension without the consent of some other parties, or the direction of the Court. He afterwards put a stop upon the pension, and went out of the jurisdiction of the Court. The plaintiff then brought her second bill against the defendant, and applied to Messrs. B. & B. to accept service. They declined to do so, but promised to write to the defendant; and, in reply to repeated applications, stated that they had received no instructions from him. Upwards of two months having elapsed since the first application to Messrs B. & B.,—

Mr. *Wigram* and Mr. *Osborne*, for the plaintiff, moved that service of *subpœna* to appear and answer, on Messrs. B. & B., might be deemed good service on the defendant. They cited *Anon.*; (a) *Kinder v. Forbes*; (b) *Smith v. The Hibernian Mining Company*; (c) *English v. Kendrick*; (d) [The Vice-Chancellor referred to a case of *Hobhouse v. Courtney*, (e) which he said had recently been decided by the *Vice-Chancellor of England*.]

*THE VICE-CHANCELLOR.—This application is made [*530] not under any act of Parliament, or any general order of the Court, but it is an application to the general jurisdiction of the Court, founded on particular circumstances, and it relates to process at the inception of the suit, for the purpose of constituting the suit against this party. Without expressing any opinion on the case, I think that, considering the state of the decisions, the application had better be made to the Lord Chancellor.

The case was afterwards compromised.

Note, that in this case, the plaintiff, immediately after filing her second bill, moved for and obtained a receiver of the pension.

(a) 2 Vez. sen. 23. (b) 2 Beav. 503. (c) 1 Sch. & Lef. 238. (d) 6 Madd. 205.
(e) Since reported; 12 Sim. 140.

1843.—Firth v. Hopkins.

FIRTH V. HOPKINS.

1843: July 24th, 25th.

Under the 8th of the Orders of August, 1841, the plaintiff may obtain leave to enter an appearance for the defendant to an *amended* bill.

MR. SPURRIER, for the plaintiff, moved, under the 8th of the Orders of 26th August, 1841, for leave to enter an appearance for the defendant to the *amended* bill. A *subpœna* to appear and answer the amended bill had been served, on the 11th July, upon the defendant's solicitor.(a)

THE VICE-CHANCELLOR said that he did not exactly understand the meaning of an appearance to an amended bill. He thought that some authority should be shown for the necessity of the present motion.

Spurrier then obtained leave to consult the authorities, and on the following day, mentioned *Lord Abingdon v. Butler*,(b) *Angerstein v. Clarke*,(c) *Hinde, Pr. 22*, and *Wy. Pr. [531] *Reg. 66*, which appeared to him to show that, according to the old practice, a *subpœna* to appear to an amended bill was necessary. [The *Vice-Chancellor*.—The language of the 20th Order of April, 1828, is "*subpœna to answer an amended bill*," which seems correct.] In other orders an appearance to an amended bill seems to be contemplated. Thus the Orders of August, 1841, Nos. 7, 8, 9, 16, 17, 18, 19, 34, 35, 36, 38, 39, speak of "the bill" indefinitely, yet No. 17 must apply to an amended bill. Others of the same orders, either in themselves, or by reference to each other, define the bill. Such is the case with Nos. 20 to 29, and No. 33; and from Nos. 23 and 26, taken together, it seems clear that an appearance to an amended bill was intended. The same thing appears from the form of *subpœna* attached to the Orders of 21st December, 1833.

(a) See Ord. 3rd April, 1828, No. 20; Ord. 26th Oct. 1842, No. 19.

(b) 1 Ves jun. 206.

(c) Id. 250.

1843.—Firth v. Hopkins.

The tenth of those orders has been held to apply to amended bills. *Brooks v. Purton.*(a)

THE VICE-CHANCELLOR.—Well, I think if you want an appearance, you ought to have it.

ENTER an appearance. Give the defendant's solicitor notice, within three days, that this order has been made.

*LEE v. YOUNG.

[*532]

1843: July 27th.

Under the provisions of a marriage settlement, trustees had power, with the consent of the husband and wife, or the survivor, to vary the securities by selling out the settled stock and investing it in land, and it was provided that it should be lawful for the trustees, with the consent of the husband and wife, or the survivor, to lay out the whole of the monies to be produced by the sale of the stock in the purchase of freehold or copyhold estates of inheritance, or leasehold for a term of not less than sixty years. The husband died, and the wife married again:—*Held*, that the trustees were not bound, on the application of the wife and her second husband, to invest any of the stock on leaseholds, although the security might be eligible, and for a longer term than sixty years.

By an indenture, bearing date the 30th January, 1827, being the settlement made previously to the marriage of Alfred T. Perkins, and Charlotte his wife, certain sums of stock, one of which had been transferred, and others had been agreed to be, and were afterwards transferred into the joint names of William Augustus Pemberton and Henry Young, were settled upon trust, after the solemnization of the marriage, that the said trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, should either permit the same to remain in their actual state of investment, or should, with the consent in writing of the said A. T. Perkins and his wife, during their joint lives, and after their decease, of such of them as should first depart this life, with the consent in writing of the survivor of them during his or her life, and after the decease of

(a) Cr. & Ph. 233.

1843.—*Lee v. Young.*

the survivor, at the discretion of the said trustees or trustee for the time being, sell, transfer, or dispose of the same, &c., for such price or prices as he or they should think fit, and should, with such consent or discretion as aforesaid, lay out and invest the money in their or his names or name, in the purchase of a competent share or shares of any of the Parliamentary stocks, or public funds of Great Britain, or at interest upon Government or real securities in England or Wales, and should, from time to time, with such consent, or at such discretion as aforesaid, alter, vary, and transfer the said stocks or funds as to them or him should seem proper, and should stand possessed of the trust fund, upon trust, in the first place, to pay the premiums of a certain policy of assurance on the life of the said A. T. Perkins, and pay the surplus income to him for his life, and after his decease to pay the income to Mrs. Perkins and her assigns for her life, for her and their own use and benefit, and after the [*533] death of the survivor of *them, should stand possessed of the trust fund for the children of the marriage as therein mentioned; and if there should be no child of the marriage who should attain twenty-one, then in trust for the said A. T. Perkins, his executors, administrators, and assigns. Provided always, and it was thereby further agreed by and between the parties to the said indenture, that it should and might be lawful to and for the said William Augustus Pemberton and Henry Young, or the survivor of them, or the executors, administrators, and assigns of such survivor, during the lives of the said A. T. Perkins and Charlotte his intended wife, or the life of the survivor of them, with their, his, or her consent and approbation in writing, signed with their, his, or her hands or hand, to lay out and invest the whole or any part of the monies to be produced by the sale or disposal of any of the aforesaid stocks, funds, or securities, at any time or times, in the purchase of any freehold or copyhold manors, messuages, lands, tenements, or hereditaments in England, of an estate of inheritance, or of any leasehold lands, messuages, or tenements in England, for any term of years, (whereof not less than sixty years should be to come and unexpired at the time of such purchase,) to be conveyed or assigned to them the said William Augustus Pemberton and

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Henry Young, or the survivor of them, their, or his heirs, executors, administrators, or assigns respectively, according to the nature of the estate or interest therein, upon trust, nevertheless, by and with the consent and approbation of the said A. T. Perkins and Charlotte his intended wife, or the survivor of them, to be signified by writing, signed with their, his, or her hands or hand, during the lifetime of them or either of them, and after the decease of the survivor of them, then at the discretion and of the authority of the said William Augustus Pemberton and Henry Young, or the survivor of them, &c., to sell and dispose of the said manors, messuages, lands, tenements, or hereditaments *which should have been so purchased [*534] as aforesaid, either by public sale or private contract, and in such manner as should be deemed most convenient, and at the best price or prices that could at the time of such sale be reasonably had or gotten for the same, unto such person or persons who should be willing to become the purchaser or purchasers thereof respectively; and upon trust to apply the monies arising by such sales upon the same trusts as the monies so laid out in the purchase of manors, &c., were subject to before the purchase was made. And it was thereby declared, that any premises so purchased were to be considered as money, and be subject to the same trusts, in all respects, as the money laid out in the purchase thereof was subject to before such purchase was made. The settlement contained a power enabling the intended husband and wife, and the survivor of them, to appoint new trustees in the room of any trustee or trustees dying, or desiring to be discharged from, or refusing or becoming incapable to act in the trusts.

Alfred Thrale Perkins died in 1827, soon after the marriage, of which there was no issue, leaving his wife surviving him.

In 1832, Mrs. Perkins married the plaintiff, William Lee. In 1841, Mr. and Mrs. Lee being desirous of increasing Mrs. Lee's income under the settlement, proposed to the trustees that part of the trust monies should be laid out in the purchase of certain leaseholds which were offered for sale, and of which nearly ninety years were unexpired. To this proposal Mr. Pemberton, one of the trustees, was willing to accede. His co-trustee, how-

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ever, Mr. Young, positively refused to comply with the request, and the estate was consequently sold to other parties.

Mr. and Mrs. Lee then filed their bill against the trustees, Pemberton and Young, praying that the latter might be discharged, and removed from being a trustee of the settlement, and that some other fit and proper person might be appointed trustee in his place, or otherwise that proper directions might be given by the Court touching the execution of the trusts of the settlement.

The defendant Young, by his answer, admitted that the proposed security was not in itself objectionable, but alleged as a reason for his refusal to comply with the plaintiffs' request, that Alfred Thrale Perkins left a family by a former wife, who, under his will, were entitled to the trust fund, subject to the life interest of the plaintiff, Mrs. Lee, and that they objected to the proposed investment. It appeared, however, that Young having been appointed executor with Pemberton of the testator's will, had renounced probate, Pemberton alone proving the will.

Mr. Russell, and *Piggott*, for the plaintiffs.

Mr. Wigram, and *G. L. Russell*, for the defendant Young.

Mr. Beales, for the defendant Pemberton.

THE VICE-CHANCELLOR.—Supposing, for the sake of argument, that Mr. Pemberton is, so far as Mr. Young is concerned, to be considered a person having the entire control, legally and equitably, over the interest of the late Mr. Perkins, there is yet here an interest neither represented nor capable of being represented, namely, the interest of Mrs. Lee, in the event of her surviving Mr. Lee, in the income of the fund during her life, after his decease.

The object of the plaintiffs, or rather the husband, (and it may, perhaps be a fair and reasonable object in many respects,) is to expend a part of the capital in the shape of an increased income, to be derived from property held only on a determinable interest during his life; of course by so much as the income

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may be increased during his life, the "capital must be [536] diminished in value after his decease. And in case Mrs. Lee should wish, and it should be thought reasonable by those having control over the fund after Mr. Lee's decease, to deal with this property by way of change of investment or purchase in any given way, there will of necessity be less capital to deal with. She has, I repeat, an interest neither represented nor capable of being represented. That renders it the duty of the trustees respectively to exercise their discretion, if they have a discretion on the subject. One of these trustees, whether he has given a perfectly good reason or not—whether he has given every reason that he might have given or not—has thought fit to object to the proposed investment. I cannot say that he has not a right to object, or that there do not exist reasons which may justify him in objecting; and when I see that the language of the power has nothing in it imperative, that it does not contain any expression to the effect that the trustees are "required" to exercise it, and that there are other powers in this settlement which leave less to the discretion of the trustees than this clause, I am of opinion that this is a discretionary power; that the discretion has not been corruptly exercised; and that it has been exercised, whether for perfectly good reasons or not, whether for reasons that wholly appear or not, in a manner which the Court cannot say is improper, or upon reasonable grounds. I therefore cannot interfere.

I have not gone further into the case, because the reasons upon which I have proceeded seems to me sufficient.

Dismiss the bill, and let the costs of the defendants be paid out of the income, as between solicitor and client, to be taxed if the parties differ.

 1843.—Wentworth v. Tubb.

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*WENTWORTH V. TUBB.

1843: August 1st.

The costs of an unsuccessful traverse of an inquisition of lunacy, allowed out of the lunatic's estate.[1]

THIS cause came on for hearing upon an exception to the Master's report, by which a certain sum of money was found to be due from the estate of the deceased lunatic to his solicitor, for the costs of an unsuccessful traverse to an inquisition *de lunatico inquirendo*.

Mr. *Simpkinson*, and Mr. *Dixon*, for the exception, said, that although if the lunatic had been living, the *Lord Chancellor* might have exercised a discretion in favor of the solicitor, yet upon the death of the lunatic it would be going too far to hold that the costs were payable as a debt out of the lunatic's estate. They referred to *Sherwood v. Sanderson*,^(a) *In re Bridge*.^(b)

Mr. *Russell*, and Mr. *Parry*, *contra*.

THE VICE-CHANCELLOR.—I think that the principles upon which it was decided that the plaintiff had a debt against the estate of the lunatic,^(c) decide the present question.

It cannot be, that an alleged lunatic is so far deprived of the means of defending himself as to be prevented from having the benefit of a solicitor, unless the solicitor be employed by a third party, or lose his costs if the proceedings are unsuccessful; yet that would be the result if the present objection were allowed. I apprehend the law to be, that if a man is alleged to be a lunatic, whether truly or not, he may employ (as far as he can be

^(a) 19 Ves. 280.

^(b) Cr. & Ph. 338.

^(c) See *ante*, Vol. 1, p. 171; affirmed by the *Lord Chancellor*, M. T. 1842.

[1] See note [3] of Mr. Dunlap, *In re Bridge*, 1 Cr. & Ph. page 350, and the American and English cases there cited.

 1843:—Wentworth v. Tubb.

said to exercise volition on the subject) a solicitor, not only to resist the "commission, but afterwards, for the [*538] purpose of traversing it, and that, although the proceedings fail, the lunatic's estate is liable for the costs, subject to this—that if anything fraudulent or unfair—or, perhaps I may go as far as to say frivolous or litigious—appears to have taken place on the part of the solicitor, the Court may say that no debt arises. There is no evidence of that nature here, and therefore, the amount of costs not being impeached, I must take it to be a fair debt.

MEMORANDA.

In Trinity term, 1843, *Thomas Pemberton Leigh*, Esq., of Lincoln's Inn, was appointed a member of her Majesty's most honorable Privy Council.

In Michaelmas Term, *John Romilly*, Esq., of Gray's Inn, was appointed one of her Majesty's counsel.

*STAVERS V. BARNARD.

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1843: November 7th, 8th.

Testator bequeathed a residuary personal fund to trustees, upon trust to apply the dividends for the maintenance of his children, until the youngest should attain twenty-one, and then to divide the same equally between B., D., E., and F., children by his former wife, and G. and H., children by his present wife, *and such other child or children as might be living*, or as his said wife might be *eniente* with at his decease. The testator, at his death, left two other children besides those named in his will, viz. A. and C., who were children by his first marriage:—*Held*, under all the circumstances of the case, that they took no interest in the fund.

WILLIAM STAVERS, by his will, after directing payment of his debts, gave and bequeathed to his executors and trustees cer-

1843 — *Stavers v. Barnard.*

tain leasehold tenements, his stock in the Bank, and all the residue of his estate and effects, in trust, to pay the rents, issues, and profits of his said leasehold houses, and the interest and dividends of all such stock in the Bank, and the interest and dividends of the residue of his estate, (which he requested might be collected together, and invested in their names in some or one of the public funds,) unto his wife, Elizabeth Stavers, and her assigns, or permit or suffer her or them to receive and take the same for and during the term of her natural life, provided she continued his widow; and from and after her decease or marriage, in trust, to sell and dispose of his leasehold premises by public auction or private contract, and to stand possessed of the money arising therefrom, and all such stock in the Bank, and the residue of his effects; in trust, in the first place, by and out of the dividends, interest, and produce, to pay unto his said wife, (in case of her marriage,) an annuity or yearly sum of £100 during her life, for her separate use, and not to be subject or liable to the debts, control or engagements of any husband she might marry; and any attempt to raise money, or raising money thereon by anticipation, to be a forfeiture of the said annuity, and the same to sink into the residue of his estate. The testator then proceeded thus:—"And upon trust as to the remainder of such dividends, interest, and produce, to apply the same to and for the maintenance of my children, until the youngest child attains his age of twenty-one years, and then to divide the same equally between William Stavers, Francis Stavers, Peter [*540] Mellish Stavers, Thomas Reid Stavers, and *Elizabeth Ann Stavers, children by my former wife, and David Stavers, and Isabella Stavers, children by my present wife, and such other child or children as may be living, or as she my said wife may be *enciente* with at my decease, equally to be divided between them on their attaining their respective ages of twenty-one years, share and share alike, subject to the proviso after mentioned; and in case of the death of any of my said children leaving issue, then in trust as to the part or share of such child or children so dying, for such issue. Provided always, that no division of my said property shall take place until my youngest child attains twenty-one years, but the dividends and interest

1843.—*Stavers v. Barnard.*

shall be applied for the maintenance of such of my children as shall be then under twenty-one, and the surplus invested to increase the fund until the same becomes divisible as aforesaid."

At the death of the testator, which took place in 1816, there were living the several children named in his will, and also two other children by his first marriage, namely, Margaret, the wife of John Dawson, and John Read Stavers, the former of whom was the testator's eldest, and the latter, his third, surviving child; William being the second. Mrs. Dawson was born in 1787, and John Read Stavers, in 1791. The two children of the second marriage, named in the will, and who were the only children of that marriage who survived the testator, were born respectively in 1811 and 1814.

The bill was filed in 1839 against the executors under the will, for the purpose of having the accounts of the testator's estate taken, and obtaining a declaration of the rights of the parties. At the original hearing of the cause, before *The Vice-Chancellor of England*, the bill was dismissed as to the grandchildren of the testator, who had been made parties to the suit.

The cause now coming on for hearing for further *di- [*541] rections, the question was, whether Margaret Dawson and John Read Stavers took any interest under the will.

Mr. *Wigram*, and Mr. *Stevens*, for the plaintiffs.

Mr. *Kennion*, for defendants in the same interest with the plaintiffs.

Mr. *Cooke*, for the defendant Mrs. Dawson, observed, that in the clause for maintenance, the testator referred to his children generally; but without the aid of that clause, the bequest to such other child or children as might be living at the testator's decease, would necessarily include all his children, whether of the first or second marriage.

Mr. *Wilcock*, for the defendant John Read Stavers.

Nov. 8th.—THE VICE-CHANCELLOR.—I have read this will

1843.—*Stavers v. Barnard.*

again; and although there are some passages which, taken by themselves, might lead to the inference that all the children of the first marriage were intended to be included, yet, reading the whole will (as it must be read,) together, especially, with the evidence of the number and ages of the children, it is impossible, I think, upon a reasonable construction of it, to doubt that the two whose names are omitted were intended to be excluded. I am sorry for it, but I can decide nothing else.

It appearing to the Court, that the defendants, John Dawson and Margaret his wife, and the defendant John Read Stavers, take no interest in the residue, upon payment of their costs, dismiss the bill against them. Declare that the defendant Elizabeth Stavers is entitled for her life or widowhood to the income of the leaseholds, and of the residue, subject to the observance of the covenants of the lease, and to the payment of the rent payable in respect of the same. At the request of all parties, appoint new trustees. Let the costs of all parties, including the costs paid by the plaintiffs at the former hearing, be raised and paid as between solicitor and client. Liberty to apply.

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*GIBSON v. D'ESTE.

1843: November 7th, 8th, 9th, 22nd.

A contract for the purchase of an estate, rescinded at the suit of the purchaser, on the ground of fraudulent misrepresentation; the contract having been completed with the knowledge, on the part of the defendant or her agent, of the existence of a public right of way over the property, and the plaintiff not knowing or having the means of knowing that fact.

THE circumstances of this case, the nature and object of the suit, and the line of argument taken by the counsel on each side respectively, will sufficiently appear from the judgment.

Mr. *Swanston*, and Mr. *Faber*, for the plaintiff.

Mr. *Wigram*, and Mr. *Heathfield*, for the defendant.

The following authorities were cited or referred to :—*Edward*

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v. *M'Leay* ;(a) *Long v. Fletcher* ;(b) *Bree v. Holbech* ;(c) *Early v. Garrett* ;(d) *Hitchcock v. Giddings* ;(e) *Oldfield v. Round* ;(f) *Cator v. Earl of Pembroke* ;(g) *Small v. Atwood* ;(h) *Lovell v. Hicks* ;(i) *Binks v. Lord Rokeby* ;(k) *Ainslie v. Medlycott* ;(l) *Burrowes v. Locke* ;(m) *Lord Clermont v. Tasburgh* ;(n) *Ellard v. Lord Llandaff* .(o)

Nov. 22d.—THE VICE-CHANCELLOR.—Having fully considered this case, and thinking that farther delay in disposing of it cannot be advantageous, I am prepared to state the conclusion at which I have arrived—have arrived, not certainly without previous hesitation. I have, indeed, seldom had occasion to deal with a cause from the decision of which it would have been a greater relief to me to be if possible, discharged.

The object of the bill, filed in September, 1840, is to *re- [*543] scind and be relieved against the purchase of a messuage and land at Ramsgate, made by the plaintiff of the defendant, and completed in the month of December, 1838. The plaintiff puts his case for relief upon the ground of a right of way over the property, which he asserts to have existed at and before the time of the sale, within the defendant's knowledge, and to have been unfairly concealed from him by the defendant or her agents, who in effect, as he insists, represented the estate to him in a manner inconsistent with the notion of the existence of any such right. He says that this right was altogether unknown to him, and that it affects the convenience and value of the property materially, and most prejudicially. Insisting that he has been defrauded, he maintains that, for this reason, as well as on account of the nature and character of the defect discovered, he

(a) *Coop. 308* ; 2 *Swanst. 287*. As to the effect of an agent's unintentional misrepresentations, where he is ignorant of the defect, and has received general instructions only to let or sell, see *Cornfoot v. Fwuke*, 6 *M. & W. 358* ; *Wilson v. Fuller*, 3 *Q. B. 68*.

(b) 2 *Eq. Ca. Abr. 5*, pl. 4.

(c) *Doug. 554*.

(d) 4 *Man. & Ry. 647* ; 9 *B. & C. 928*.

(e) 4 *Price, 135*.

(f) 5 *Ves. 508*.

(g) 1 *Bro. C. C. 301* ; 2 *Bro. 282*.

(h) 1 *Younge, 461* (judgment.)

(i) 2 *Y. & C. 51* (judgment.)

(k) 2 *Swanst. 222*.

(l) 9 *Ves. 13*.

(m) 10 *Ves. 470*.

(n) 1 *J. & W. 112*.

(o) 1 *Ball. & B. 2 49* (judgment.)

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cannot be required to accept compensation, but is entitled to annul the transaction.

The defendant opposes the plaintiff's claim totally, but alleges that if he is entitled to any relief, it can only be in the shape of compensation.

This is the dispute which, involving various questions and a great body of evidence, has been brought before me, and has been argued ably on each side.

It may be right to say, at the outset, that the plaintiff, though insisting that he is well founded in treating the case as one of fraud, yet, by his counsel at the bar, disclaims any charge or imputation upon the integrity, personally, of the defendant, who seems to have left, as it was likely she would do, the management of the business of the sale on her part to agents, and attended probably but little, if in any degree, to it. She wished, in all likelihood, if she thought about the matter, or, if she had thought about it, would have wished, that everything should be transacted regularly, openly, and fairly.

The way in question is called the Liberty-way. It leads, or led, from a street called King-street, to, or towards the [*544] *sea, traversing lands which the late Lady Augusta De Ameland had at different times acquired by purchase. Near its course stood the dwelling-house formerly owned and occupied by that lady, which is comprised in the plaintiff's purchase from the defendant, who, shortly before Lady Augusta's death in 1830, appears to have acquired her Ramsgate property by conveyance from her. The land about the house having been, up to the year 1820, chiefly open and unclosed, Lady Augusta appears to have been inconvenienced and annoyed by the neighborhood of this way. She did not, however, take, or did not succeed in, any measures for procuring it to be legally stopped or diverted, but entered into an arrangement concerning it with certain authorities of the place, which is explained by a deed poll executed by her in that year. Before stating the deed, I may say, in passing, that this Liberty-way forms the boundary, or that close along it or upon it (centrally or otherwise) runs the boundary line separating the franchise or liberty of the town of Ramsgate from the parish of St. Lawrence, or from so much

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of the parish of St. Lawrence as is not within the franchise or liberty of the town of Ramsgate. This deed is dated the 30th March 1820, and is thus:—"To all people to whom these presents shall come, the Lady Augusta De Ameland, of &c., sendeth greeting. Whereas, at a vestry meeting of the inhabitants of the parish of St. Lawrence, Ramsgate, duly holden in pursuance of notice for that purpose in the vestry of the parish church of St. Lawrence aforesaid, on Thursday, the 17th February, 1820, it was, upon the application and request of the said Lady Augusta De Ameland, resolved, that the consent of this vestry (as far as lawfully can or may be) should be given to the said Lady Augusta De Ameland to inclose so much of the Liberty-way between the town and parish as leads from the North Cliff by the front of her house to the end of the plantation on the north-east side of the said way, upon the following conditions, namely, that, during *all such time as the said Liberty-way should be [*545] inclosed by virtue of this consent, another road, six feet wide, at the least, from the cliff, by the back part of Lady Augusta De Ameland's stables, and thence through the adjoining ground, to communicate with the Liberty-way without her inclosures, should be formed and maintained by and at the expense of the said Lady Augusta De Ameland and her heirs, that the part of the Liberty-way inclosed should be marked out by proper mark-stones, to be set down and maintained by and at the expense of the said Lady Augusta De Ameland, to the satisfaction of the surveyors of the town and parish, who should twice or oftener in every year survey and examine the said mark-stones, that a deed should be executed by the said Lady Augusta De Ameland, and at her expense, acknowledging for herself and her heirs that the Liberty-way is inclosed by permission, and not of right, and that the same should be reopened whenever the parishoners in vestry assembled should require the same, upon seven days' notice for that purpose from the surveyors of the highways, or the major part of them, and by such deed a yearly rent of 5s., by way of acknowledgment, should be reserved in respect of such inclosed Liberty-way, payable in moieties for the surveyors of the town and parish, as, by the record of the proceedings of the said vestry contained in the parish vestry-book, will appear. Now, know ye,

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that, in pursuance of, and in conformity to, such resolutions, the said Lady Augusta De Ameland doth hereby, for herself, her heirs, executors, administrators, and assigns, expressly acknowledge and declare, that the part of the Liberty-way permitted to be inclosed by virtue of the consent of the vestry meeting aforesaid, is, and will be, so inclosed by virtue of the consent and permission of the said vestry meeting alone, and under the terms and conditions above mentioned. And the said Lady Augusta De Ameland doth [*546] also, for herself, her heirs, executors, administrators, and assigns, wholly and utterly disclaim all or any right whatsoever to inclose, or keep inclosed, the said Liberty-way, other than and except by such consent and permission as aforesaid; and doth also declare and agree that the same Liberty-way is liable to be, and shall be re-opened, and the inclosures thereof removed, upon having such notice given to her or her heirs, executors, administrators or assigns, or any of them, or left at her or their, or any of their usual place of abode, as is mentioned in the said resolutions; and that she, the said Lady Augusta De Ameland, her heirs, executors, administrators, and assigns, is, and are bound by, and shall and will in all respects conform to and comply with the terms and conditions upon which such consent and permission hath been given to her as aforesaid, to inclose the said Liberty-way, and particularly as to the payment of the acknowledgment of 5s. a year, which shall be paid by the said Lady Augusta De Ameland, her heirs or assigns, on Easter-Monday in every year, in equal moieties, to the surveyors of the parish of St. Lawrence and the town of Ramsgate, in the Town-hall of the said town of Ramsgate. In witness whereof, the said Lady Augusta De Ameland hath hereunto set her hand and seal."

It does not appear that this instrument was ever in the possession or power of the defendant, or that she ever had any copy or abstract of it before the year 1840. But the defendant by her agent for several years between Lady Augusta's death and the year 1838, paid the 5s. per annum made payable by it, as Lady Augusta had done in her lifetime. This payment was frequently, if not constantly, made on the defendant's behalf, by Mr. Wightwick, a solicitor. Mr. Wightwick was present at the vestry meeting mentioned in the deed, and must be taken to

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have known, when he paid the 5s. a year, upon what footing the money was paid; nor is it to be supposed that he had not, in and before the year 1838, some *information, [*547] some knowledge, as to the line and course of the Liberty-way over Lady Augusta's property.

To return to that lady's time: It appears that in conformity, or intended conformity, with the deed, certain stones were put up for the purpose of marking the course of the way in front of her house, and she thereupon, so far as it was in front of her house, inclosed it in her pleasure-grounds, extinguishing, as I collect, all trace of it as a road or path there, and substituting a road or pathway which passed on the other side of her house, in the manner that the deed mentions.

In this state the property seems to have continued until the year 1838, when the defendant, having been advised to sell the estate by auction in lots, and under arrangements for building, proceeded to do so under the advice of Mr. Allason, a surveyor.

The plan in evidence annexed to the particulars and conditions of sale, also in evidence, was prepared by him on this occasion.

The auction having been held in August or September, 1838, the plaintiff became the purchaser of the last lot, the subject of this suit. He became so, of course, under the particulars and conditions of sale just referred to, of which the plan prepared by Mr. Allason formed a part.

The particulars describe the lot thus:—"The capital freehold mansion, called mount Albion, with the offices, stabling, out-buildings, gardens, and pleasure-grounds, containing about one acre, two roods, and twenty-three perches, with immediate possession. The mansion and offices are substantially brick-built, in good repair." And then follows the usual catalogue of contents and conveniences. "The purchaser to inclose this lot by a wall or iron railing, not acceding nine feet in height, and to covenant not to erect any buildings more than nine feet high, within 200 feet of its boundary next Albion-terrace, under a penalty of £3000, to be paid to the vendor. The *fix- [*548] tures in the mansion and offices will be included in the

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purchase." The fifth and tenth conditions of sale are thus: The fifth—"That no purchaser shall be entitled to require or inspect any title prior to the deeds by which the property was respectively conveyed to the vendor or Lady Augusta De Ameland respectively, or to require or inspect the title to any of the respective roads, walks, or pleasure-grounds, or to any of the premises, except to the lot or lots purchased by him or her; and that the vendor shall not be called upon to identify the respective lots with the former descriptions thereof; and all recitals and statements contained in any document shall be deemed conclusive evidence thereof; and all attested and other copies of any deeds or documents of title shall be made by and at the expense of the person requiring the same." The tenth is, "That, upon payment of the remainder of the purchase-money at the time above mentioned, the vendor shall convey the lots to the respective purchaser; each purchaser, at his or her expense, to prepare the conveyance to him or her which shall contain covenants and reservations with and to the vendor, to the effect stated in the particulars and these conditions; and that all expenses of or attending the assignment or surrender of any attendant or satisfied terms, and of qualifying any person or persons to make such assignment or surrender, shall be paid by the purchaser."

An abstract was delivered, the title accepted, and, in December, 1838, as I have said, the purchase was completed by payment of the purchase-money, execution of the conveyance, and delivery of possession. The particulars of sale having provided that the plaintiff should inclose the lot by a wall or iron railing, his conveyances contains this covenant on his part:—"And, in consideration of the premises, the said Magnus Gibson covenants for himself, his heirs, and assigns, with the said Augusta Emma D'Este, her heirs and assigns, that he, his heirs [*549] or assigns, shall *and will, within the space of six calendar months next after the sealing and deliverery of this indenture, at his and their own expense, inclose the lands and premises thereby conveyed, or intended so to be, by a wall or iron railing not exceeding nine feet in height."

Afterwards, in May, 1839, a claim was made upon the plaintiff for one of the payments of 2*s.* 6*d.* under the deed of 1820.

He declined to make the payment. In the month of January following, a demand for another half crown was made upon him also under the deed. This payment he likewise declined to make. Differences thus arose between him and the local authorities, or some of them, and they have asserted their alleged right to pass over his land not merely for perambulating the boundaries, but in respect of a right of way. In the month of March, 1840, the plaintiff first complains on the subject to the defendant's agents. A fruitless negotiation ensues, and the result is the present suit, in which it is disputed what were, and are, the nature and character of the Liberty-way, and what its course and width, so far as the late Lady A. De Ameland's property is concerned. The true state, however, of these matters, as to which there is a considerable body of testimony not agreeing together, I find, having read and endeavoured to weigh the whole of the evidence, that it does not enable me with accuracy or exactness to define or decide.

There are, however, some propositions of fact relating to these subjects, which I think that, upon the materials before me, I may and ought to consider as established between the plaintiff and defendant for the purposes of this suit—I say between the plaintiff and defendant for the purposes of this suit, inasmuch as plainly neither the public nor any third party can be affected by any conclusion in this cause. These propositions are the following :—First, that in 1820, before the execution of the deed of that year, the Liberty-way (whatever its nature and whatever its *width,) proceeding from King-street to, or [*550] towards the seacliff, traversed the whole length of Lady Augusta De Ameland's estate between King-street and what is now called Victoria-parade. Secondly, that the Liberty-way thus existing was an ancient way, of the width throughout or not less than six feet, traversing the whole length of the estate in question purchased by the plaintiff of the defendant, on its south-western side, from what is now called Arklow-terrace to what is now called Albion terrace—so traversing, namely, that if the whole width of not less than six feet was not upon the plaintiff's property there was upon it not less at any point than two feet and a half in width of this way. Thirdly, that the

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plaintiff's property, so far as the Liberty-way is concerned, is now subject to the deed of 1820, and that a considerable portion, at least, of the wall which, as admitted by the answer in page 30 of the brief that I have, has been built by the plaintiff in pursuance of the particulars of sale and his purchase-deed, is liable to be abated, either under the deed of 1820, or otherwise. Fourthly, that independently of any new right or liability created, if any was created, by the deed of 1820 the Liberty-way was subject to the exercise of certain rights of way or passage, either of a public nature, or by prescription, or grant, or otherwise, which, if not merged, or extinguished, or vested in one of the parties to this cause, are now exercisable upon and over it. Fifthly, that notwithstanding the parol evidence in the suit, as to acquisitions by Lady Augusta De Ameland, and notwithstanding the length of time during which the Liberty-way has been diverted or shut up, so far as relates to the part of its course now particularly under consideration, it is not satisfactorily or sufficiently proved, or made to appear, that these rights are merged, or extinguished, or vested in either of the parties before me. Sixthly, that having regard to the size and nature, the situation and neighborhood, of the property in question, at a sea-
[*551] port town "in Kent much frequented as a bathing-place, the difference in point of convenience and value between its condition as described by the preceding five propositions, whether certain or uncertain of not being liable to still greater interference in respect of this Liberty-way, and its condition as it would be if exempt from any right of way or passage, and from the deed of 1820, is material and important. These points being established, as, in my judgment, upon the materials in this cause they are, the next question is, what was it that the defendant proposed, agreed, and professed to sell to the plaintiff? This is sufficiently shown by the particulars of sale, the plan annexed to them, the defendant's answer, and the evidence on her behalf of her surveyor, Mr. Allason. The required inclosure by a wall or iron railing of the lot in question, and the aspect and character of the plan, coupled with the silence of the particulars and conditions of sale as to any right of way, must, in my

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opinion, be considered as tantamount to a representation that this lot was not subject to any right of way.

The defendant, in her answer, says, "She believes, and under the circumstances aforesaid, she submits, that no right or liberty of way now exists over or adjoining to said messuage, land, and premises so purchased by said plaintiff, but that the same, having existed only for the purposes hereinbefore stated, has been wholly extinguished and put an end to in the manner and by the means aforesaid." And she "admits that the said premises, purchased by said plaintiff, are represented in the said conveyance to said plaintiff to be situate without the liberty of Ramsgate, in the parish of St. Lawrence, and in that manner, and not otherwise, to be wholly within the parish of St. Lawrence, and saith, that such conveyance was prepared by said plaintiff or his solicitor, and not by or on the part of defendant." And she "saith she hath been informed and believes, that her solicitor, said Mr. Wightwick, had, previous to the time of said sale, taken pains to *ascertain the direction of [*552] said Liberty-way, and had ascertained to his satisfaction that the same, as formerly used and exercised as aforesaid, lay wholly without the premises purchased by plaintiff as aforesaid, and so believed at the time of such sale and of the completion thereof. However, she says she has been informed, and believes, that, under the circumstances herein appearing, said alleged Liberty-way was considered and believed by her agents to have been by the means aforesaid extinguished and put an end to, and that, if any pretence for the same existed, such Liberty-way, as it formerly existed, was included in the line of the said Victoria-road, so that said deed-poll properly formed no part of her title. And she has been informed and believes, that at the time of laying out the property of defendant for the purposes of said sale, it was believed that the boundary line between the liberty of Ramsgate, and the parish of St. Lawrence without the liberty ran in the line of the north-east side of what now forms the Victoria-road, being the line of the wall built by said plaintiff as aforesaid; and that, accordingly, in said map or plan annexed to or exhibited with such particulars of sale as aforesaid, the boundary line is so marked or described at that part of the prop-

erty which lies to the south or south-east of the premises sold to said plaintiff."

Mr. Allason, as the defendant's witness, deposes as follows :—
 "I was employed by the said defendant, some time about the early part of 1838, to lay out for building purposes a property of hers at Ramsgate, in the County of Kent, preparatory to a sale thereof by auction. The said property was then called or known as the Mount Albion Estate, and consisted of a mansion-house and grounds and a small farm, containing altogether about thirty-seven acres of land. My instructions were to parcel out the said property in the most advantageous way for building purposes, and to mark out the roads which were to be [553] formed upon it. I accordingly laid out the said property for building purposes, and marked out the roads to be formed thereon, and prepared a map or plan of my design. The document which I now produce to the examiner by whom I am being examined, marked A. 1, is a printed copy of such map or plan, and represents accurately the roads which I marked out as aforesaid, and the situation and direction, in which way they were to be formed, and the width of which they were to be constructed, the roads so marked out by me being those which traverse or intersect the portions of the said produced plan, which are coloured pink, or red and green. The map or plan now also produced and shown to me, marked A. Z., appears to me to be likewise, as far as it goes, a correct plan of the said estate as laid out by me, and to represent accurately the direction and width of the roads so marked out by me as aforesaid." To the eleventh interrogatory, he says, "I first became acquainted with the claim of the parish of Ramsgate to be entitled to a right of way over a portion of the said estate, in the course of the time that I was engaged in planning out the said estate for building purposes. The first intimation that I had of such claim was conveyed to me by Mr. Wightwick, the solicitor at Ramsgate of the said defendant, and he informed me that the said parish claimed to be entitled to a right of way across the said estate, in continuation of an old road out of King-street to the cliff, and that the line claimed across the said estate was marked by stones. The said Mr. Wightwick, however, at the

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same time added, that he did not believe that the parish could establish their claim to the said right of way across the said defendant's property. After receiving this information from Mr. Wightwick, I examined the line mentioned by him, and found three marked stones, at different intervals, in a straight line between the north-west side of the said estate and the cliff. One or more of these stones, and I believe the whole of them had the letters T. R. engraved upon the south-west *side [*554] of them, and I interpreted those letters to mean the town of Ramsgate, and to denote that they were boundary stones between the town or parish of Ramsgate and the parish of St. Lawrence; and as the said right of way was understood by me as being claimed exclusively by the parish of Ramsgate, I concluded that if any such existed, it passed in the direction and on the south-west side of the said stones. I was not at the time that I laid out the said estate, or at any time before the sale thereof by auction, in any manner informed, nor did I believe or suspect, that the said defendant or her mother, Lady A. de Ameland, had in any manner, by deed or otherwise, acknowledged or admitted the existence of the said right of way across the said property. After I received the aforesaid information from the said Mr. Wightwick, I planned, in making out the road upon the said estate which is called Victoria-road, and which is represented under that name upon the produced plan, that that road should comprise the line which, for the reasons before stated, I concluded to be the line claimed by the said parish as the continuation of the said road or way called Liberty-way; and to the best of my belief, the said Victoria-road comprises and is formed upon the site of, and in the same line and direction as, the said right of way claimed by the said parish of Ramsgate across the said defendant's estate, and it is made in a line with, and close up to, and wholly on the south west side of, the said stones. The said Victoria-road is open, and is now used by the public as a public road or highway." To the twelfth interrogatory he says, "The said estate was put up for sale in lots by public auction at Ramsgate, by the direction of the said defendant, on the 31st August, 1838, and the following day, by Messrs. Foster & Sons. I was present at the said sale. The document

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now produced and shown to me, marked A. X., is a printed copy of the particulars and conditions of sale according to which the said estate was put up for sale, and such particulars and [*555] *conditions were read publicly at the said sale by the auctioneer who put up the said property for sale. The printed particulars and conditions used at the said sale had a map or plan annexed thereto, similar to the said produced plan marked A. 1, which is annexed to the said produced document marked A. X. The said plaintiff bid for and purchased at the said sale the said lot which is described on page 14 of the said produced document marked A. X. The said produced plan marked A. 1, only shows expressly that portion of the said road or way called Liberty-way, which is next to King-street, and upon which the words "Liberty-way" are marked upon the said last mentioned produced plan; but the line in which I believed at the time of the said sale, that the said road or way was continued across the said defendant's estate, is virtually and in effect shown by the last-mentioned produced plan, inasmuch as the said then intended road called Victoria-road is marked out accurately on the said last-mentioned plan, and that road, as I have before stated, was so marked out and planned by me as to cover and comprise what, at the time of the said sale, I believed to be the line of the said Liberty-way across the said defendant's estate. I fully believed, at the time of the said sale, for the reasons already stated, that the said Liberty-way (if any such existed) did not pass over any portion of the lot purchased as aforesaid by the plaintiff at the said sale. I have since then heard it represented, that, instead of the whole width of the said Liberty-way, namely, six feet, being situated in the parish of Ramsgate, as I concluded and acted upon in lotting the said estate for sale, and planning the line of the said Victoria-road, one half of it, namely three feet, stands on the north-east side of the said stones, and, consequently, in the parish of St. Lawrence; and if this be so, then the said Liberty-way passes over a strip of the lot purchased as aforesaid by the said plaintiff, to the extent of three feet in breadth, along the south-west [*556] side of it; *but whether the said representation is correct or not, I do not know, and have not the means of

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forming a belief." To the thirteenth interrogatory he says, "I believed that, at the time of the said sale, I had kept the whole of the said Liberty-way from off the land comprised in the lot which was purchased by the said plaintiff; and if, in lotting the said estate and in planning out the roads upon it preparatory to the said sale, I had been aware that the said Liberty-way passed in the way I have since heard it claimed to pass, namely, three feet on the north-east side of the said stones, I could readily have excluded the whole of it from the said lot, by simply carrying the line of the said Victoria-road three feet further to the north-east than its present line. I consider that, had this been done before the said sale, the said lot purchased as aforesaid by the plaintiff would not have fetched less at the said sale than the said plaintiff gave for it; and that the only compensation to which the said plaintiff could fairly be entitled now, if he is entitled to any, is merely the value of a strip of land three feet in breadth, to be taken off from the south-west side of his lot; for to no further extent does the more recently claimed right of way diminish the value of the said lot; and such a consideration is too trifling to have had any effect on the price which the said lot would have fetched at the said sale. I was not any time directed by the said defendant or by her solicitors, or by any person on her behalf, to conceal, nor did I in fact conceal from the said plaintiff or his solicitor, the knowledge that any public way or right of way existed, (if in fact the same did exist,) in, through, or over the said land or grounds of the said defendant, or in, through, or over the said land or ground purchased by the said plaintiff, and I have no reason to believe or suspect that the existence of such way or right of way (if in fact the same ever existed) was in any manner concealed by the said defendant, or by any person acting for her or on her behalf, at any time before or after the *said sale, from the knowledge of the [*557] said plaintiff or his solicitor, or any person acting for him or on his behalf. I did not, at the time of the completion of the said title and conveyance to the said plaintiff, know, suspect, or believe, that Lady H. De Ameland had, by any deed or deeds, or in any manner, acknowledged that the said Liberty-way or alleged Liberty-way in, through, or over the said lands or grounds

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in any manner existed." That is the whole of Mr. Allason's evidence for the defendant.

The parcels in the conveyance to the plaintiff, to which is annexed a plan, agreeing, I think, substantially, if not exactly, with the plan annexed to the particulars of sale, are thus described by that conveyance :—" All that piece or parcel of freehold land or ground, containing by estimation 1 acre 2 roods, and 23 perches, be the same little more or less, situate, lying, and being without the liberty of Ramsgate, in the parish of St. Lawrence, in the isle of Thanet and county of Kent, abutting towards the north-east on a certain new intended road or way, forty feet wide, called or intended to be called Albion-road; towards the south-east, on a certain new intended street or terrace, forty feet wide, called or intended to be called Albion-terrace; towards the south-west, on a certain other new intended road or way, forty feet wide, called or intended to be called Victoria-road; and towards the north-west, on a certain other new intended street or terrace, forty feet wide, called or intended to be called Arklow-terrace, together with the capital mansion-house, messuage, or tenement, erected and built thereon, or on some part thereof, called or known by the name of Mount Albion, formerly in the tenure or occupation of the said Augusta Emma D'Este."

It is upon the whole, I think, perfectly clear, that what the defendant proposed, agreed, and professed to sell to the plaintiff, and what the plaintiff agreed to buy of the defendant, [*558] was a property wholly without the liberty of "Ramsgate, a property not subject to, and not affected by, the Liberty-way, or any right of way at all.

It is, in my opinion, as clearly established, that the plaintiff made and completed his purchase in ignorance, and without any notice, of the deed of 1820; in ignorance also, and without notice, of the pecuniary payment or payments made under it, or reserved by it.

It is, nevertheless, contended by the defendant's answer, and by her counsel at the bar, that the language of the abstract, and the appearance of the boundary stones, gave notice to the plaintiff of the true condition of the property, or contained so much to put him on inquiry with respect to the Liberty-way as to pre-

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clude him from saying that he had no notice of its true course, and the real condition of the property. Allusion has been made also to the mention of the Liberty-way on the plan, and to the notice also of the town boundary which the plan bears on the face of it. The liberty-way, however, is so marked, where it is mentioned on the plan, as not to give any notion that it touched or affected the lot in question, and as, indeed, rather to create positively a different impression; and so with regard to the town boundary—that is traced and mentioned, so far as it is traced and mentioned, in a manner to create, not a belief that any part of the lot was within the town of Ramsgate, but a belief the very reverse. The dotted lines and forms which appear faintly marked on different portions of the plan, have not been contended, on either side, to be of any materiality, or to support or give rise to any argument.

With regard, indeed, to plans connected with sales by auction in general, I may say here how entirely I accede to the justice and good sense of the language used by a distinguished person, in a case where a contract for the sale of building land was decided to be vitiated by a right of way held to have been concealed or undisclosed; I mean the case of *Dykes v. Blake*, where Lord Chief Justice *Tindal* says—"Particulars, [*559] and plans of this nature, should be so framed as to convey clear information to the ordinary class of persons who frequent sales by auction; and they would only become a snare to the purchaser, if, after the bidder had been misled by them, the seller should be able to avail himself of expressions which none but lawyers could understand or attend to."(a)

It is true that the boundary stones, and some portions of the language of the abstract, and of the plaintiff's conveyance, were, as I think, consistent with the notion of the Liberty-way possibly affecting to some extent the lot in question, but consistent also with the notion that it did not at all affect it. All trace of the old course of the Liberty-way appears to have vanished, long before 1838, from the surface of the ground along the southwestern boundary of the lot (that next Victoria-road,) and from

(a) 4 New Ca. 476.

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what is now Victoria-road. It cannot, I conceive, be thought unreasonable or necessarily at variance with these stones and documents, to have supposed the whole of the Liberty-way to be without the parish of St. Lawrence, or within the town of Ramsgate. A road, or way, or river, the opposite sides or banks of which are in different parishes or different estates, does, I apprehend, in a sense, and according to usual modes of expression, separate those two parishes or estates, or form the boundary between them, or the boundary of each, whether the road, or way, or river, be wholly in one, or partly in each of the two parishes or estates. I do not now speak of precise accuracy of expression, I refer to customary modes of speech; nor must the passages which I have read from the defendant's answer, the evidence of Mr. Allason, the language of the particulars of sale, the plan annexed, and the fifth condition of sale, be forgotten. Upon the exclusive appropriation, twice professed, of the 4 acres, [*560] 2 roods, 10 perches, between *Albion terrace and the sea, to be inclosed by an iron railing, I do not think that any observation unfavorable to the plaintiff's case, and I am not entirely satisfied that any observation unfavorable to the defendant's case, arises. Whether that was a profession capable of being made good, may not, perhaps, be clear. I think, having regard to all the circumstances, I am bound to consider that the plaintiff, before he completed his purchase, had not notice of the true course of the Liberty-way, or of the true condition of the property, and was not put or called upon to doubt the accuracy, fidelity, or honesty, of the particulars or conditions of sale, or the annexed plan, according to the sense which Mr. Allason intended them to bear. I conceive that the plaintiff is to be considered a purchaser, without notice actual or constructive of the defect in question.

The next point to be considered, is the question, whether at and before the time of the auction at which the plaintiff bought, the defendant, by herself or her agent, was aware of the manner in which the lot in question was affected by the Liberty-way, or was aware of facts tending to show, and bearing upon, the condition of the property as affected by the Liberty-way, which it was the vendor's duty, as that word is understood in a court

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of justice, to disclose to the purchaser. This is obviously a most important question in the case.

Now, with regard to the deed of 1820, the defendant, in her answer, expresses herself thus :—"Saith she has been informed, and believes, that, some time in the year 1820, the said Lady Augusta De Ameland, who was then the owner or proprietor of the said messuage, lands, and premises purchased by the plaintiff, but who was not then the owner or proprietor of the whole of the said lands and premises to which said alleged Liberty-way led, and for the enjoyment of, and access to which the same was, as the defendant believes, used, was desirous of inclosing so much of the said alleged Liberty-way as passed through the property *which then belonged to her, as [*561] well as the premises sold to the plaintiff as aforesaid, and other lands contiguous thereto ; and that by and under the direction of Mr. Daniel, who then acted as the solicitor for the said parish of St. Lawrence and for the liberty of Ramsgate, and also for the said Lady A. De Ameland, a negotiation took place between the said Mr. Daniel, acting as such solicitor as aforesaid, for and on behalf of the said Lady A. De Ameland, and the officers of the said parish and liberty ; and that it was agreed that the said Lady A. De Ameland should be at liberty to inclose the said portion of the said alleged Liberty-way, upon payment to the said officers of the said parish and liberty of an annual sum of 2s. 6d., as an acknowledgment of right of way over the said alleged Liberty-way. Saith that such negotiation took place, and such agreement was entered into by or on behalf of the said Lady A. De Ameland, in ignorance by her of her rights, and in ignorance that said Liberty-way was, as defendant alleges, only a right of way appurtenant to and belonging to the lands of the said Lady A. De Ameland, and to the lands to which she was not then entitled as aforesaid ; and such agreement was entered into, as defendant believes, by and under the advice of Mr. Daniel, who acted as solicitor not only for Lady A. De Ameland, but also for the said parish and Liberty. Saith that, save and except as aforesaid, and as herein appears, she is unable to set forth, as to her knowledge, &c., whether the said plaintiff did or did not, upon the occasion in the said bill mentioned, or whether

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it is or is not the fact, that, in or about the month of March, 1820, or at any other time, the said Lady A. De Ameland applied to the officers of the said town of Ramsgate, and parish of St. Lawrence, or to any other and what persons or person, and requested to be allowed to inclose so much of the said alleged Liberty-way as passed through the property, or any or what part of the said alleged Liberty-way, or whether the said [*562] officers, or any other and what person or persons, "did not assent thereto. Saith she hath been informed and believes that the deed-poll was made and executed, &c., as in the bill mentioned. However, defendant saith that the said deed-poll was, as defendant has been informed and believes, prepared by said Mr. Daniel, acting in such capacities as aforesaid, and was executed by Lady A. De Ameland in ignorance by her of her rights, and of the nature of the said way, and believing that the said officers had or possessed the power to enforce a right of way over her property, when, in fact, no such right of way, as defendant submits, ever existed, except for the purposes aforesaid; and, therefore, defendant humbly submits, that said deed-poll was not binding and conclusive upon said Lady A. De Ameland, or upon any other person or persons claiming under her. Saith, that the defendant did not, at the time of the sale of the said premises to the plaintiff, or at any time, know that the said deed-poll had been made and executed by the said Lady A. De Ameland, save that, since the commencement of this suit, she has been informed thereof, and that she was first so informed thereof in November, 1840. Saith she hath been informed and believes that the said deed-poll has no plan or map annexed to the same, and that it does not appear thereby what was the position or direction of said alleged path or way, and that it cannot be ascertained thereby that the said alleged way was not comprised and included (if in fact the same was not comprised or included) in the said Victoria-road. Saith she did not, at the time of said sale, nor at any other time, know that the said alleged Liberty-way, stated to be claimed by the said town and parish, was, as is alleged, included (but which defendant does not admit to be included) with the premises so sold by her to the said plaintiff as aforesaid, save and except as

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she was for the first time informed thereof by the claim made by the plaintiff on the 19th March, 1840."

Now, as far as any opinion of mine on the materials before me may extend, I particularly desire it to be understood, that I do not express or intimate any opinion upon what the defendant says in her answer, as to the prudence of that deed which the defendant says Lady A. De Ameland was advised to execute. It may, however, be proper to observe, that, whether the execution by Lady Augusta De Ameland of the deed-poll of 1820 was a measure wise or imprudent, founded or not founded in error, prejudicial or not prejudicial to her interest, no step has ever been taken to impeach or be relieved from it, and the defendant's counsel have very properly admitted at the bar, that, for the purposes of this suit, at least, it must be taken to be a valid and binding deed. [*563]

To return to the answer of the defendant, I find it also to contain these passages :—"She believes that she has, by her agents, and since the year 1830 *regularly paid* the nominal rent reserved by the said deed-poll, the same appearing in the accounts furnished to her by her agents; but save as she has been informed thereof by said bill, (but which statement in respect thereof defendant does not admit to be true,) and save as she has since the filing of said bill been informed that such payment was made in conformity with the stipulations contained in said deed-poll, of the existence or nature of which she was ignorant until November, 1840, as aforesaid, and save as appears by said accounts, the defendant is unable to set forth to her knowledge when said payment was made, as an acknowledgment of the right, or alleged right, of said town and parish to re-open said alleged Liberty-way; defendant believing that such payment was made as a regular outgoing from the estate, the particulars of which, from the smallness of the sums, she was not induced to, and did not, inquire into,"—a statement which one has no difficulty in entirely believing. She then admits that she did, by her agents, under the circumstances, and in manner aforesaid, make the said yearly payments: but denies that she has "in any [*564] other manner acknowledged the right of the said town and parish.

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Of Mr. Wightwick, a solicitor, already mentioned, the name appears prominently in the particulars and conditions of sale; at the foot of page 1, thus:—"May be viewed one month before the sale, by particulars, which may be had, with colored plans, &c., of Messrs. Farr & Parkinson, 66, Lincoln's-inn-fields; of Thomas Allason, Esq., 13, Great Cumberland-street; of Humphry Wightwick, Esq., Ramsgate." His name also appears in the third, fourth, and thirteenth of the conditions of sale. This gentleman is mentioned also several times in the answer, and the defendant admits that he was her solicitor. He has been examined as a witness in the cause, in chief, I believe, for each party. He is described as aged sixty at the time of his examination, and upon the second, third, fourth, fifth, and eleventh interrogatories for the defendant, he deposes thus:—"I have resided in Ramsgate for the last thirty-seven years; I know the freehold mansion called 'Mount Albion,' with the grounds thereof, in the pleadings mentioned; I have done so for about twenty years past," &c. —"I have known the road or way at or near Ramsgate, called the 'Liberty-way,' for the last twenty-three years and upwards: my attention was particularly called to it in the year 1820, from having been present at a vestry meeting held at the parish of St. Lawrence, on the 17th February, 1820, when Lady A. De Ameland applied for leave to inclose the part of it leading in front of her house." He then describes the direction of the road or way, and then proceeds.—"I cannot say whether the said way is now stopped or obstructed, or diverted at any particular place between King-street and the said Mount Albion estate, by any land, for I do not know what was the precise direction of the said way at the place inquired after. There are stones in the wall surrounding the land between King-street and the said Mount Albion, intending to denote that the Liberty-way *passed over such land, but I am not certain who is the owner of such land. The said road or way called the 'Liberty-way' did formerly lead to lands of owners or proprietors adjoining thereto; but since 1820, I am not aware that any other person has had any lands adjoining to the Liberty-way except Lady A. De Ameland. Such road was necessary to the enjoyment of property near thereto. I know the greater part of the lands and

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grounds which formed the Mount Albion estate ; I first knew the same particularly in 1820. The said Lady A. De Ameland acquired the principal part thereof, having purchased the same, from time to time, between the years 1807 and 1825 ; I did not know the particular state and condition of the said estate before she purchased the same. Before she inclosed the said lands and grounds, they were open and uninclosed. The said Liberty-way passed over the said lands in front of Mount Albion House. There was the appearance of a road ; what I should call a cart-road. I particularly remember Lady A. De Ameland directing my attention to the nuisance to which she was subject from the Liberty-road being open in front of her house. There was a park-paling or fence in front of the said Mount Albion House. There was the Liberty-way running between the said house and the said fence ; the said Liberty-way was not defined or limited, except so far as the said park-paling on the one side, and the said Mount Albion House on the other, formed a boundary ; it was a rough road. The particular description which I have given has reference to a time commencing about 1820. I have only a general knowledge of the road prior to that time. I believe Lady A. De Ameland became the proprietor of all adjoining lands to which the Liberty-way led from the north-west side of the Mount Albion House to the sea cliff ; she was also the proprietor of some land between the north-west side of Mount Albion House and King-street. The Liberty-way was particularly defined by marked stones put down *in 1820, to show the way [*566] from the north-west side of the grounds passing by the front of the said Mount Albion House, down to the sea cliff. The exact line of the said way prior to the said stones being put down could not be ascertained, except that there was a track on which carts might pass leading down to the said sea cliff." To the eleventh interrogatory he thus deposes : " There was a meeting of the parishoners and rate-payers of the parish of St. Lawrence, which then included the town of Ramsgate, held on the 17th February, 1820, for the purpose of considering the proposition of stopping up the Liberty-way." This witness then proceeds to prove the resolutions adopted at the meeting, stating that Mr.

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Daniel was present, acting as solicitor for the parish and Lady A. De Ameland.

I may observe, in passing, that whether what this witness upon the fifth interrogatory, says respecting the indictment, is or is not evidence, it extends only to the turning towards Broadstairs, and not to the opposite direction.

The same witness, to the twentieth interrogatory for the plaintiff, deposes thus :—"I say, as the solicitor, or agent of the defendant, and also of Lady A. De Ameland before her, as from Easter to Easter, for several years, I paid 2s. 6d. to the surveyor of the parish of Ramsgate, and a similar sum to the surveyor of the parish of St. Lawrence, as an acknowledgment of an alleged right of way near and in front of Mount Albion House, in the third interrogatory mentioned. I made some of such payments, as I have said, on behalf of the defendant." He then says this :—"The defendant did clearly know that such right of way was claimed, and that such payments were made by me on her behalf, as an acknowledgment of such right or alleged right. I know for what the sums I have named were paid, having been present at a vestry meeting in the month of February, 1820, when permission was granted to Lady A. De Ameland [567] to inclose the part of the "Liberty-road in front of Mount Albion House. I made the payments under my general authority as agent, and rendered my accounts from time to time to both Lady A. De Ameland and the defendant, in which such payments would appear."

Certain accounts, which are stated to be all or some of the accounts which the defendant thus mentioned by the witness, are in her possession ; two, at least, of them are in evidence ; they appear to correspond with the witness's description of them, and to contain items of 2s. 6d., as paid in respect of the Liberty-way. [His Honor here read some parts of the accounts.] A bill of costs also of Mr. Wightwick against the defendant has been produced from her possession ; it extends over several months of the years 1836 and 1837, and is plainly a bill between a solicitor and his client. [His Honor here read some of the items of the bill of costs.]

To return to Mr. Wightwick's evidence for the defendant, he deposes upon the seventh, eighth, and ninth interrogatories thus :

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"The said mansion-house and lands, late of the said Lady A. De Ameland, were inclosed, so as to form one estate, about 1820 ; but she had other lands adjoining thereto. The principal part of the lands so inclosed were laid out and planted by her as pleasure-grounds, and used as such by her and others occupying the said house, except a small garden which she let. The said Liberty-way did not lead to any other lands that I am aware of, except those belonging to Lady A. De Ameland. Such lands extended to, or nearly to, the sea-cliff ; but there was a broad pathway, which I have mentioned in answer to the last preceding interrogatory, for the public, on the outside of the fence, next to the sea, communicating with a road leading at the back of the said Mount Albion House, as a substitute for the part of the Liberty-road stopped up by permission of the vestry of St. Lawrence parish. The said lands on the south-east side were separated from the said pathway by a *wall [*568] with an iron railing thereon, in front of the sea. This was about 1820, and was made by the said Lady A. De Ameland. So much of the said Liberty-way as passed through the said lands was wholly stopped up in the year 1810. It was so stopped up by a pale fence, at, I should say, 100 feet at the least on the north-west side of the Mount Albion House, towards King-street, and it was also stopped up, in the manner I have before described, at the end next to the sea-cliff. The Liberty-way was stopped up by permission of the vestry of the said parish of St. Lawrence. After the Liberty-way was so stopped up, it became inaccessible to the public. Very soon after the said Liberty-way was so stopped up, mark stones were placed, *supposed to be in the centre of the said Liberty-way*, as it originally ran, so as to mark and distinguish the line and direction thereof. Stones were marked denoting what was then called the township of Ramsgate and the parish of St. Lawrence. The said stones were so placed by the authority of the said vestry, and under the direction of the commissioners of pavement of Ramsgate and the surveyors of St. Lawrence. I cannot state where, in particular, such stones were placed, nor whether in a straight or direct line with each other, but they were three in number. The line of the said Liberty-way was, as I have stated, shown

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by mark stones ; those stones showed the division of the liberty of Ramsgate from the parish of St. Lawrence. I was present, in April, 1839, when one of the mark stones was moved from the road in which it then stood, in a direct line towards the sea-cliff. This was in consequence of one of the new roads then making on the Mount Albion estate. I know the direction of the Victoria-road in the pleadings mentioned. My impression is, that the said Liberty-way was a six-foot way, and that about two or three feet thereof are comprised in the said Victoria road, and two or three feet are between the said wall and the said Mount Albion House. I judge this from my recollection [*569] of the space before the *said wall was built, from looking out of the balcony in front of the said Mount Albion House." Upon the twelfth, thirteenth, fourteenth, and fifteenth interrogatories for the defendant, (I have before read Mr. Wightwick's deposition on the eleventh,) he deposes thus:—"There were mark stones placed in pursuance of the resolutions of the said vestry referred to in the last preceding interrogatory, as I have stated in answer to the said preceding interrogatory." To the thirteenth:—"I say that the town of Ramsgate, and the liberty thereof, is within the Cinque Ports, and is a member of Sandwich. What is called the Liberty-way divided the said liberty of Ramsgate from the parish of St. Lawrence." To the fourteenth:—"I say that it has been, as far as I know, in and since the year 1820, and is now, the custom of the vicars and churchwardens, and such of the parishioners as choose to attend to walk the boundaries of the liberty of Ramsgate, which divide the same from the adjoining parish of St. Lawrence: this takes place usually about once in every five or seven years, on Ascension Thursday." To the fifteenth:—"I say that, in the year 1830, I went the boundaries of the said liberty of Ramsgate, and the vicar of St. Lawrence and many of the parishioners were present; we then went for the purpose of ascertaining the boundaries. I did not, but other persons did, perambulate so much of the boundaries as passes through the lands or grounds of the said Mount Albion estate. I have no doubt that we went in the line or direction of the stones which are inquired after by the twelfth preceding interrogatory."

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It may here be right to refer again to Mr. Allason's deposition to the eleventh interrogatory for the defendant, which I have before read. [His Honor read it again.] The effect of this is, I believe, plainly and unmistakeably at variance and inconsistent with what Mr. Wightwick in his evidence deposes as to his belief on the subject. It may be remarked, that Mr. Wightwick, whose deposition *to the last interrogatory [*570] for the plaintiff, and to the last interrogatory for the defendant, I have not omitted to observe, is silent as to any conversation with Mr. Allason. It is, perhaps, still more remarkable, that Mr. Wightwick's testimony either contradicts, or at least does not confirm, what the answer of the defendant states in one of the passages that I have already read; thus:—"Saith she hath been informed, and believes, that her solicitor, Mr. Wightwick, had, previous to the time of said sale, taken pains to ascertain the direction of said alleged Liberty-way, and had ascertained to his satisfaction that the same, as formeley used and exercised as aforesaid, lay wholly without the premises purchased by plaintiff as aforesaid, and so believed at the time of said sale, and of the completion thereof."

Considering what I have read and stated—considering especially what Mr. Wightwick says as to the centre of the road, and considering what appears in various parts of the evidence as to the perambulations that have taken place, can I hear it in this suit effectually said, on the part of the defendant, that, at the time of the auction, she was ignorant of the deed of 1820, ignorant of its continued recognition on her part, or ignorant that the lot sold to the plaintiff was affected by the Liberty-way, was clogged and hampered as to its enjoyment in a manner that the particulars and conditions, and the annexed plan, did not, and were intended not to represent? I am of opinion that I cannot; and that the contract and its completion took place under concealment from him, and substantially under misrepresentation to him, of material facts within the knowledge of the defendant, or of her agent, whose knowledge, for the present purpose, must be held equivalent to her knowledge, but not within the knowledge, of the plaintiff, he also being, in the sense in

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which the expression has been used by Lord Eldon with reference to a question of the present kind, without the [*571] means of knowing the true *state of those facts. For that he might have inquired and learned the truth by inquiry, is nothing, if there was not, as I think that there was not, any circumstance which, considering what he was told by the party contracting with, him, was sufficient to apprise or warn him of the necessity or propriety of any such inquiry. The possibility of learning the truth by inquiry existed in *Lysney v. Selby*,^(a) I apprehend, as well as in *Edwards v. M'Leay* and other cases, where the charge of fraud has been successfully made. I concur with the plaintiff's counsel, as I have said, in not imputing any want of integrity, any want of good intentions, to the defendant personally. Her affairs were, as it was likely they should be, committed to the management of others. That Mr. Wightwick did not intend to do or to sanction anything that he thought wrong, I am willing to believe. He may not have closely considered what was the right line. He may have thought "*Aliud est celare, aliud tacere. Non, quidquid tibi audire utile est, id mihi dicere neceese est.*" He may have thought that, in the exercise of his duty towards his principal, he was not proceeding beyond the bounds of a justifiable silence, though knowing what he knew, in allowing Mr. Allason to proceed as he did, and the particulars and plan to go forth to the world as they did. He may not have been struck with that to which I have already referred, concerning the pleasure-ground of 4 acres, 2 roods, and 10 perches. He may not have been forcibly struck with the substantial omission of the plan to notice the substituted, equally, and the original, line of the Liberty-way between Arklow-terrace and Albion-terrace. He may have thought it not unlikely that the parish and the town would be willing to accept, and be satisfied with, the Victoria-road and the Albion-road, subject or not subject to the eighth condition of sale, which condition he may have thought fair and proper. All [*572] this *may have been. But as one of the learned Judges asked in *Corbett v. Brown*,^(a) I ask (though not in a

(a) 2 Lord Raym. 1118.

(b) 8 Bing. 37.

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sense offensive towards any person,) must not a Court infer fraud from the combination of the knowledge that existed with the representation made, and the facts not disclosed? I may refer, also, to the judgment of the Lord Chief-Justice *Tindal*, in *Flight v. Booth*,^(a) and to the judgments of the same learned Judge and *Bosanquet, J.*, in *Foster v. Charles*,^(b) where they thus express themselves: The Lord Chief-Justice says—"No sufficient ground has been laid to induce us to disturb the verdict which has been found for the plaintiff. The application arises on a misconception of what the jury have found. They first deliver a verdict for the plaintiff with damages, and then add, that in point of fact they consider the defendant had no fraudulent intention, although he had been guilty of fraud in the legal acceptance of the term. Their attention had been drawn by me to two classes of motives possible on the part of the defendant: first, a desire to benefit himself, by making a statement which he knew to be false; secondly, a desire to benefit some third person; and I stated, that, although there might be no intention on his part to obtain an advantage for himself, it would be still a fraud, for which he was responsible in law, if he made representations productive of loss to another, knowing such representations to be false. The jury, in finding that he had no intention to defraud, mean only that he was not actuated by the baser motive of obtaining an advantage for himself, but that he was guilty of fraud in law by stating that which he knew to be false, and which was the cause of loss to the plaintiff. The question therefore, is, whether, if a party makes representations which he knows to be false, and occasions injury thereby, he is not liable for the *consequences of his falsehood? It would [*573] be most dangerous to hold that he is not. The confusion seems to have arisen from not distinguishing between what is fraud in law and the motives for actual fraud. It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad: the person who makes such representations is responsible for the consequences."

(a) 1 New Ca. 370
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(b) 7 Bing. 106.

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Bosanquet, J., says, "There seems to me to be no reason for disturbing this verdict. In the course of the trial, it is probable that improper motives had been ascribed to the defendant. The *Chief Justice*, therefore, stated to the jury, and stated correctly, that motives of that description in the defendant were not essential to the plaintiff's action; if a person tells a falsehood, the natural and obvious consequence of which if acted on, is injury to another, that is fraud in law. Coupling that with what the *Chief Justice* addressed to the jury, their verdict only means that the defendant did not propose to benefit himself, perhaps intending to benefit another; but that what he said, intending to bending to benefit another, was false within his own knowledge injurious to the party who received the communication, and consequently a fraud in the legal acceptance of the term."

Foster v. Charles was approved by the Court of Queen's Bench in *Polhill v. Walter*,^(a) where Lord *Tenterden*, C. J., thus expresses himself: "It was in the next place contended, that the allegation of *falsehood and fraud* in the first count was supported by the evidence; and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; it was said to be enough, if a representation is made which the party making it [^{*574}] *knows to be untrue*, and *which is intended by him, or which from the mode in which it is made, is calculated to induce another to act on the faith of it, in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word *a fraud*; and for this position was cited the case of *Foster v. Charles*, which was twice under the consideration of the Court of Common Pleas, and to which may be added the recent case of *Corbett v. Brown*. The principle of these cases appears to us to be well founded, and to apply to the present. It is true that there the representation was made *immediately* to the plaintiff, and was *intended* by the defendant to induce the plaintiff to do the act which caused him damage.

(a) 3 B. & Adol. 123, 124.

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Here, the representation is made to all to whom the bill may be offered in the course of circulation, and is, in fact, intended to be made to all, and the plaintiff is one of those; and the defendant must be taken to have intended, that all such persons should give credit to the acceptance, and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result.

If, then, the defendant, when he wrote the acceptance, and thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did,) the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.

If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted under a power of attorney which he supposed to be genuine, but which was, in fact, a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew *to be untrue, though with no cor- [575] rupt motive. It is of the greatest importance in all transactions, that the truth should be strictly adhered to"—and as useful, the noble and learned lord might have said, and probably he thought, as it is wise.

Borrowing the language of that eminent Judge, I ask, had Mr. Wightwick or the defendant good reason to believe the representation made by the particulars and plan to be faithful and true—good reason to believe that it was immaterial to the plaintiff to know the undisclosed facts which he did not know, and they did know? I am of opinion, that it is impossible to hold that either Mr. Wightwick or the defendant had any such good reason. With the case of *Polhill v. Walter*, I apprehend the case of *Freeman v. Baker*,^(a) and that of *Early v. Garrett*,^(b) cited by Mr. *Wigram*, to be consistent.

Again, I find Lord *Eldon*, in the well-known case of *Evans*

(a) B. & Ad. 797.

(b) 4 Man. & Ry. 687.

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v. *Bicknell*,^(a) saying, "It is a very old head of equity, that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false." Sir *William Grant*, in the case brought to my recollection by Mr. *Swanston, Burrowes v. Lock*,^(b) after referring to those expressions of Lord *Eldon*, proceeds thus:—"In this case the plaintiff was going to deal with Cartwright upon a matter of interest and applied to the person best qualified to give information, the trustee, to know what Cartwright was entitled to; who told the plaintiff expressly, that Cartwright was entitled to £288, and had an undoubted right to make an assignment to that extent; knowing that he had not a right to make such assignment, having previously agreed to give another person [576] £10 per cent. out of the fund. "There is, therefore, a concurrence of all the circumstances which the *Lord Chancellor* thinks requisite to raise the equity. The excuse alleged by the trustee is, that, though he had received information of the fact, he did not at that time recollect it. But what can the plaintiff do to make out a case of this kind, but show, first, that the fact, as represented is false: secondly, that the person making the representation had a knowledge of a fact contrary to it. The plaintiff cannot dive into the secret recesses of his heart, so as to know whether he did or did not recollect the fact; and it is no excuse to say he did not recollect it. At least it was gross negligence to take upon him to aver, positively and distinctly, that Cartwright was entitled to the whole fund, without giving himself the trouble to recollect whether the fact was so or not,—without thinking upon the subject."

The case of *Edwards v. M'Leay*^(c) is, I believe, universally received as one of binding authority. Sir *William Grant* there says, "Whether it would be a fraud to offer as good, a title which the vendor knows to be defective in point of law, it is not necessary to determine: but if he knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to a purchaser."

(a) 6 Ves. 174.

(b) 10 Ves. 475, 476.

(c) Coop. 312.

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On the appeal in that case,^(a) Lord *Eldon* said, "The case resolves itself into this question, whether the representation made to the plaintiff was not, in the sense in which we use the term fraudulent? I am not apprised of any such decision; but I agree with the Master of the Rolls, that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract." Neither of these great Judges appears to "require the establishment of an intention actually fraudulent or corrupt as a condition essential to relief. [*577]"

To the principles upon which *Edwards v. M'Leay* was decided, the present Lord Chancellor when Lord Chief Baron of the Exchequer, expressed his assent in a distinguished judgment which I had the advantage of hearing delivered—the judgment, I mean, pronounced in the case of *Small v. Atwood*, on the 1st of November, 1832.^(b) I did not then, nor, from the report of it, do I, collect that he considered the language of Sir *William Grant* and Lord *Eldon*, which I have just quoted, to need either addition or change, nor do I consider that they would have differed, or that Lord *Lyndhurst* would differ, from Mr. Justice *Bayley's* opinion in *Early v. Garrett*—an opinion agreeing with other authorities and with reason, and not questioned by Mr. *Wigram* who cited the case, which that learned Judge expressed in these words:—"I make no distinction between an active and a passive communication, for a fraudulent concealment is as bad as a wilful misrepresentation. A fraudulent concealment by the seller, of a fact which he ought to communicate, would undoubtedly vitiate the sale."^(c) Upon the sense in which the word "fraudulent" is, for the purpose before us, to be understood—upon that which must for the safety of the dealings of men, and for the objects of justice, be held in such cases to be fraud, I have already endeavoured to express myself in language better than my own, proceeding from authority more entitled to attention than mine.

On the whole, can it be a question, supposing that I am right in considering as proved those propositions of fact which I have

(a) 2 Swanst. 289.

(b) 1 Younge, 455

(c) 4 Man. & Ry. 690.

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stated, whether. if the true facts had been discovered by the plaintiff between the contract and the completion of the purchase, and he had thereupon rejected the contract, he would [*578] have been upheld, both in *equity and at law, in that rejection? I conceive that certainly he would have been so, and the notion of compensation would have been excluded upon principles of reason and justice, as well as upon the authority of *Stewart v. Alliston*,^(a) and numerous other decisions. Why, if the plaintiff has come in reasonable time, is he to be in a worse situation because by the defendant's wrong (the sense in which I use the term will not be mistaken) a completion of the contract was obtained before the discovery? For that I find no reason in principle or authority. Has he then come in reasonable time, the defendant insisting that he has come either too early or too late? As to coming too early, enough perhaps, has taken place, and the nature of the defect, probably, is such as, to render a reference to Sir *William Grant's* observations upon that point, in *Edwards v. M'Leay*, superfluous: they are, however, conclusive. His words, in page 318 of Sir *G. Cooper's Reports*, are these —“The only other objection which the defendants make to the relief sought by the bill is, that the plaintiff is premature in his application, inasmuch as he has not yet been evicted, and may perhaps never be evicted. But I apprehend, that a Court of equity has quite ground enough to act upon, and that it ought now to relieve the plaintiff from the consequences of the fraud practised upon him. It may be true that the commoners are barred by having acquiesced for more than twenty years in the inclosure; but the lord will not be conclusively barred till sixty years shall have elapsed. I have already observed, that the defendants do not pretend that there is any circumstance from which a title in them can be inferred, supposing the fact established that this made part of the common. Though the lord may never assert his right, is the plaintiff to be compelled to remain for twenty-five years longer in a state of uncertainty, whether, on any day during *that [*579] period, he may not have the convenience of his habita-

(a) 1 Mer. 26.

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tion entirely destroyed? I apprehend the Court is bound to relieve him from that state of hazard into which the misrepresentation of the defendant has brought him."

But is he too late? The purchase was completed late in December, 1838. The plaintiff appears to have been undisturbed until a demand for one of the payments of *2s. 6d. per annum* is made upon him in May, 1839. He refuses to make it. In January, 1840, another of the payments of *2s. 6d. per annum*, is required. This he also declines; and, having made inquiries, he applies to the defendant's agents on the subject, for the first time, in March, 1840. The delay imputed is that from May, 1839, to March 1840. It is not suggested, at least it is not proved, that the defendant, by reason of that delay, has, in respect of the property in question, or any part of the residue of Lady Augusta De Ameland's estate, sustained any damage, or that the property in question has been treated or dealt with by the plaintiff at any time since April, 1839, in a manner, relatively or otherwise, improper or unreasonable, or that the defendant has done, or omitted to do, anything in or since May, 1839, which, had she known earlier that the plaintiff would complain, or meant to make a claim against her, she would not have done, or would not have omitted to do; nor, whether to be considered as suggested, or not suggested, is it proved, that the plaintiff ever intended to submit to the wrong done him, to acquiesce in it, or to waive his right of redress, or to accept compensation. Under the circumstances, as the evidence stands, I think that I cannot hold the delay that has taken place such as to defeat the plaintiff's right to rescind the contract, which it appears to me to be my duty to declare.

The decree must, I apprehend, be very much in accordance with that in *Edwards v. M'Leay*. With regard to the costs to the present time, the absence of personal participation on the defendant's part, in the unfortunate miscarriage which I think has taken place, has made me feel, *whether on [*580] good or on insufficient grounds, considerable reluctance against throwing those costs wholly upon her. I find it, however, necessary, according to my view of the course of justice, to do so; subject to this qualification, that the evidence seeming to me too great in quantity (an observation not, I think, appli-

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cable to either side exclusively,) I consider it right to direct the taxing Master, in taxing the costs, to consider whether there is an unnecessary quantity of evidence on the plaintiff's part and if he shall be of that opinion, to attend to the circumstance. But in considering that question, the Master is to have regard to the issues taken by the defendant's answer, which, it is fair to remark, may have rendered a considerable extent of evidence advisable in point of ordinary prudence. I have formed a calculation, not, however, a close or precise calculation, as to the difference that this ought to make in the costs; which I will state, if both parties desire it, but not otherwise.

In conclusion, I may add, that it is satisfactory to me to know that the decision at which I have arrived is one subject to review; and to know also that, if it is erroneous, the error does not arise from an indisposition to maintain, to the utmost of my power, strongly, and with a firm hand, the obligation of open and plain dealing in the transactions of mankind.

DECLARE, that, under the circumstances of the case, as appearing upon the pleadings and evidence, the contract for the purchase by the plaintiff from the defendant, of the messuage, hereditaments, and premises, in the pleadings mentioned, was void; and that the sale of the said messuage, hereditaments, and premises, by the defendant to the plaintiff cannot stand. Let the indentures of lease and release, dated respectively the 28th and 29th days of December, 1838, in the pleadings mentioned, and the counterpart of the said release be cancelled. Refer it to the Master to whom this cause stands referred, to take an account of all the costs, charges, and expenses, to which the plaintiff has been properly put, in consequence of, or incident to, the purchase of the said messuage, hereditaments, and premises, and the conveyance thereof to the plaintiff, including the expenses of building the wall in the pleadings mentioned, and the moiety of the auction duty paid by the plaintiff on the sale, [*581] and the expense *of insuring the premises from fire. Let the Master compute interest after the rate of £4 per cent. per annum upon the several sums which, upon taking the aforesaid account, he shall find to have been so paid, laid out, or incurred by the plaintiff; and also upon the sum of £2,030, the purchase-money, paid on the 29th December, 1838, by the plaintiff for the said messuage, hereditaments, and premises; and upon the sum of 101*l.* 10*s.*, paid on the 31st of August, 1838, by the plaintiff, in pursuance of the sixteenth of the conditions of sale in the pleadings mentioned, from the respective times when such sums were respectively expended and paid. And let the said Master take an account of the rents and profits of the said messuage, hereditaments, and premises, received by the plaintiff since the said sale thereof to him, or which, but for his wilful neglect or default, he might have received. The plaintiff to be charged with an occupation rent in the common form.

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And let the Master set off the amount of such rents and profits, and the amount of such occupation rent, if any, against what he shall find from time to time due for interest hereinbefore directed to be computed, and then against the amount of the said sums paid, laid out, or incurred by the plaintiff in consequence of, or incidentally to, the purchase of the said messuage, hereditaments and premises, together with the said sums of £2,030 and £101 10s., and state the balance. Refer it to the taxing Master to tax the plaintiff his costs of this suit to this time. In taxing such costs, let the taxing Master consider whether any and what part of the evidence taken on the part of the plaintiff in this suit was unnecessary, having regard to the matters in issue in this suit; and if he shall find any part of such evidence to have been unnecessary, let him disallow the costs thereof, and also the costs of so much of the taxation as he shall find to have been occasioned by the inquiry respecting such unnecessary evidence. Let the taxing Master certify the amount of the plaintiff's costs of the suit as taxed as aforesaid. Let the defendant pay to the plaintiff the amount of such balance as the Master shall find to be due to him, together with his costs of the suit, when so taxed as aforesaid. And upon payment of such balance and costs, let the plaintiff reconvey and re-assign the said messuage, hereditaments, and premises, at the expense of the defendant, to the defendant, or as she shall direct, freed and discharged of and from all charges and incumbrances made or created by the plaintiff, or any person or persons claiming, or to claim, through or under him. And let such conveyance and re-assignment contain mutual releases of each party from the covenants contained in the said indenture of release. And let such reconveyance and re-assignment be settled by the said Master in case the parties differ about the same; and reserve the costs of such settlement by the Master. And let the plaintiff return to the defendant the abstract of the title of the said messuage, hereditaments, and premises, and deliver up the documents of title, if any, relating thereto, in his custody or power, to the defendant, or as she shall direct. Liberty to apply. Reserve subsequent costs.

 *YOUNG V. MARTIN.

[*582]

1843: November 17th, 18th.

A testatrix, after reciting a power of appointment given to her by her deceased father's will over certain personal property, and stating that she computed such property to be of the value of £18,000, or thereabouts, appointed that sum, whether the same should be the whole or parcel only of the amount of such property, to trustees upon certain trusts:—*Held*, that the appointment extended only to the sum of £18,000. A testatrix bequeathed two sums of £9,000 to trustees for the benefit of her two daughters and their children; but if either of them should die unmarried, then she gave that daughter's £9,000 to the trustees, upon trust, as to £5,000, part thereof, for the surviving daughter, under the same restrictions as her original portion, and, as to the remaining £4,000, in trust for her two sons, Thomas and George, in equal moieties; and if the survivor of her two daughters should die unmarried, then she

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directed that the share of that daughter (£14,000) should be divided amongst her three sons, James, Thomas, and George, for *their own use and benefit absolutely*. Then followed a disposition, in favor of the survivor of Thomas and George, (in the event of either dying unmarried in the lifetime of the surviving daughter,) of the share or shares of the daughter or daughters before bequeathed to them, and a disposition in favor of James of the whole of the said daughter's shares and fortunes, if both Thomas and George should die unmarried. One of the daughters having died unmarried in the lifetime of the three brothers:—*Held*, that Thomas and George were not thereupon absolutely entitled to the £4,000.

A testatrix, after bequeathing certain property to her two daughters, and to her three sons, Thomas, George, and James, gave the residue of her personal estate unto her two sons, Thomas and George, if both living at her decease, in equal shares, or, if either of them should be then dead, without leaving issue, wholly to the survivor of them; and if they should be then both dead, without leaving issue, then wholly to her son James; or if he should be then dead, without leaving issue, leaving her said daughters, or either of them, then living, then to and amongst her said daughters, or the survivor of them, equally, or to an only surviving daughter. But nevertheless, she directed that, if either of her daughters, or if any of her sons, should die, leaving issue, the issue of each of her daughters and sons so dying and leaving issue should take their, her, or his parent's respective share of the provisions she had already made for her said daughters and sons, respectively, equally, share and share alike, in case the parent or parents of such issue should not have otherwise appointed the same:—*Held*, first, that the testatrix, by the term "provisions," meant only the residue; secondly, that the two sons, Thomas and George, having survived the testatrix, were absolutely entitled to the residue.

A testatrix, after bequeathing property to her two sons, proceeded thus:—"But I most earnestly wish that my said sons may give or settle their respective shares on their respective daughters, in preference to their sons." *Qere*, whether these words were imperative, or merely precatory.

A testator, after giving to his daughter an absolute power of appointment by will over certain property, recommended, though he did not absolutely enjoin, his said daughter to distribute the same at his decease amongst her daughters in equal shares:—*Held*, that these words were merely precatory.

THOMAS MARTIN, by his will, bearing date the 18th March, 1813, after directing his trustees therein named to sell and dispose of his leasehold premises in manner therein mentioned, as to one moiety of the money to be raised by the sale, bequeathed the same to his trustees, upon trust to lay out and invest the same in the public funds, or in Government or real securities, and to receive and pay, and apply the interest, dividends, and annual produce thereof, unto and for his daughter Mary, the wife of James Young, for her life; and from and immediately after

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her decease, he gave and bequeathed the said moiety, and the stocks, funds, or securities in or upon the which the same should then *be invested, unto such person or persons, [*583] and in such shares and proportions as the said Mary Young, whether sole or covert, by her last will and testament, to be signed and published by her in the presence of, and attested by, two or more credible witnesses, should direct or appoint, give, and bequeath the same; but he, the testator, recommended, though he did not absolutely enjoin, his said daughter, Mary Young, to distribute the same at her decease amongst her daughters, in equal shares. And he gave the residue of his personal estate to his daughters, Mary Young and Ann Martin, equally to be divided between them, share and share alike.

The testator died in the month of February, 1821. Mary Young made her will, dated the 24th July, 1835, which, after reciting the bequest to, and the power of appointment vested in her by her father's will, proceeded as follows:—"And whereas the property to which I became entitled under the will of my late father, and of which I had, and now have, the power of directing, appointing, giving, and bequeathing as aforesaid, now consists of one undivided moiety, or half part or share, of my father's leasehold estates still remaining unsold and unconverted into money, and of the sum of £15,000, secured on mortgage of an estate at Tirsby, in the county of Lincoln, by John Hood, Esq., in the names of Ann Martin, Thomas Martin, and Isaac Smith, in trust for my own sole use and benefit, for life as aforesaid, and subject to such my discretion, appointment, gift, or bequest as aforesaid, and which said moiety of the said leasehold estates, together with the said sum of £15,000, so secured on mortgage as aforesaid, I compute to be of the amount or value of £18,000 sterling, or thereabouts; and whereas both the said Thomas Martin and Isaac Smith are dead; now I, in pursuance and execution of the said power and authority so given and vested in me by the said will of my said late father, as aforesaid, and of all other powers and authorities, power *and authority me thereunto enabling to do, by this my [*584] last will and testament, signed and published by me in the presence of two credible witnesses, whose names are set and

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subscribed to the attestation of my signing and publishing of this my will, direct and appoint, give, and bequeath, the sum of £18,000 of lawful money of Great Britain, whether the same be the whole or parcel only of the amount of my said moiety of the said leasehold estates and other property given and bequeathed by the said will of my said father to his trustees therein named, in trust for me, and subject to my direction, appointment, gift, and bequest, as aforesaid, unto my said dear sister, Anne Martin, and to Mr. George Martin and Edward Foxhall, which said sum of £18,000 I direct may be raised out of the said sum of £15,000 so due to me on the said mortgage as aforesaid, and out of the moiety of the said leasehold estates given and bequeathed by my said father's said will, in trust for me as aforesaid." The testatrix then directed that the said Anne Martin, George Martin, and Edward Foxhall, and the survivors, &c., should invest the said sum of £18,000 in their names in government or real securities, and stand possessed of the trust fund upon the trusts following: that is to say, as to the sum of £9,000 sterling, or one moiety of the trust fund, for each of her two daughters, Maria Theresa Young and Anne Young, for their respective lives, whether covert or sole, for their respective separate use, and from time to time to pay the interest or dividends of each of the said sums of £9,000 and £9,000, or the stocks or funds wherein or whereon the same should be invested, as aforesaid, into the proper hands of each of her said two daughters, whose receipts were to be sufficient discharges. And the testatrix directed that, in case her said daughters, or either of them, should marry, her respective sum of £9,000, or the securities upon which the same should be invested, and also such further sum or sums as should fall unto them, or either of them, by [*585] survivorship, in manner thereafter *mentioned, should be assigned to the trustees of their respective settlements, upon trust for the separate use of the said daughters, subject to such direction or appointment as they should respectively make in favor of their children by will, to be signed and published in the presence of and attested by two credible witnesses, with a proviso that, in default of such direction or appointment by either daughter, her share in the £18,000, or any accumulated share

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in the securities in which the same should be invested, should, upon her death, be paid to her children or only child. And the testatrix earnestly requested each of her said daughters to leave their respective shares to their respective daughters in preference to their sons. The testatrix then proceeded as follows.—“But if either of my said two daughters shall die unmarried, or shall have been married, and afterwards die without leaving any such issue as aforesaid, then I will, direct, appoint, give, and bequeath her said £9,000 portion aforesaid unto my said trustees, or the survivors of them, or the executors, administrators, or assigns of such survivor, upon the trusts and for the purposes next hereinafter mentioned; that is to say, as to the sum of £5,000 thereof, in trust for my said then surviving daughter, under the same restrictions as her own portion of £9,000 aforesaid so given and appointed for her; and, as to the remaining £4,000 thereof, in trust for my said two sons, Thomas Arthur Young and George Young, in equal moieties; the share of my surviving daughter to be upon the same trusts as her original share; and if the survivor of my said two daughters shall happen to die unmarried, or, having married, without leaving any such issue as aforesaid, then I direct and appoint that the share of my said surviving daughter so dying without issue as aforesaid, and which would be increased to the sum of £14,000, shall be divided to and amongst my three sons, James Young, Thomas Arthur Young, and George Young, in manner following; that is to say, the sum of £2,000 thereof *unto my son James Young, and the sum [*586] of 12,000 unto and between my said sons Thomas Arthur Young and George Young, to and for their own use and benefit absolutely. And if either of the said Thomas Arthur Young and George Young shall happen to die unmarried, or, after having married, without leaving any lawful issue (in the lifetime of the survivor of my said daughters,) then I direct, appoint, give, and bequeath, the share or shares of the said Thomas Arthur Young and George Young of and in the share or shares of my said daughter and daughters so dying unmarried and without leaving issue as aforesaid, unto the survivor of my said sons, Thomas Arthur Young and George Young (in case either shall die without leaving issue as aforesaid); or if both of my said

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sons, Thomas Arthur Young and George Young, should die unmarried, or, having married, without leaving such issue as aforesaid, then I direct, appoint, give, and bequeath the whole of my said two daughters' said shares and fortunes unto my said son James Young absolutely. But I most earnestly wish that whatever share or shares my said sons, or any of them, shall or may receive out of the fortunes of my said two daughters, or either of them, by the contingencies aforesaid, they, my said sons, or such of them as shall receive the same, may give or settle the same, on their respective daughters, or an only daughter, in case they, or any, or either of them, shall have any, in preference to any son or sons. * * * * * And in case my said two daughters, and also my said three sons, should happen to die in my lifetime unmarried, and without leaving any issue, then I direct, appoint, will, and ordain, that the whole of the said portions or fortunes I have so directed, appointed, given, and bequeathed to or for the benefit of my said two daughters, as well originally as contingently, and contingently to my said two sons respectively, shall, together with any other property, which I am or may or shall be entitled to under and by virtue of my

[*587] said father's said will, sink into and *be considered as, and constituting part and parcel of, my general personal estate. And I do hereby will, order, and direct, that all my just debts, funeral and testamentary expenses and legacies hereinafter given and bequeathed, be paid out of my general personal estate and effects; and after payment of all my just debts, funeral and testamentary expenses, and pecuniary legacies, I give and bequeath all the residue of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, unto my said two sons, Thomas Arthur Young and George Young, if both living at the time of my decease, in equal shares and proportions, or if either of them should be then dead, without leaving any issue, wholly to the survivor of them; and if they shall be then both dead, without leaving any issue, then wholly to my said son James Young: and if he should be then dead, without leaving any issue, leaving my said daughters or either of them living, then to and amongst my said daughters, or the survivor of them, equally, or to an only surviving daugh-

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ter, if there should be but one living, upon the same trusts as hereinbefore declared with respect to their respective original portions or fortunes ; but nevertheless I will and direct, that, if either of my said daughters, or any of my said sons, should happen to die leaving issue, the issue of each of my said daughters and sons so dying and leaving such issue, shall take their, her, or his respective parent's share of the provisions I have hereby made for my said daughters and sons respectively, equally, share and share alike, in case the parents or parent of such issue shall not have otherwise given or appointed the same by deed or will, under their, her, or his respective hand and seal duly executed in the presence of and attested by two or more credible witnesses respectively. And if all my said children should happen to die in my lifetime, without leaving any issue, then I give and bequeath all my residuary personal estate and effects to my then next of kin, to be distributed according to the Statute of Distributions "of Intestates' Personal Estates." And the [*588] testatrix appointed the said Anne Martin, George Martin, and Edward Foxhall, to be joint executrix and executors, as well as trustees, of her will.

The testatrix died on the 7th April, 1837, leaving her before-named three sons, James, Thomas Arthur, and George, and her before-named three daughters, Anne, and Maria Theresa, and also a daughter Juliana, surviving her. Anne Young died in the year 1839, unmarried ; the other children were all living at the institution of the suit.

The bill was filed by Thomas Arthur Young and George Young, against the executors of Mrs. Young (one of whom was also the representative of Thomas, Martin,) and the other surviving children of Mrs. Young, praying an account of Thomas Martin's personal effects beyond the £18,000 possessed by his representative, and the usual accounts of Mrs. Young's personal estate, and that the residue of her estate might be ascertained, &c.

The points raised on behalf of the plaintiffs will be seen from the arguments of their counsel.

Mr. Russell and **Mr. Speed** for the plaintiffs.—First, the ap-

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pointment of the £18,000 is not an appointment of the whole fund. [The *Vice-Chancellor*.—The £18,000 is to be “raised out of” certain property mentioned.] And that sum was to be raised whether it were the whole or a parcel of the moiety given to the testatrix by her father’s will, but nothing beyond that sum is appointed. There are sufficient words in other parts of the will to dispose of the excess. Secondly, the gift of the £4000 to the plaintiff is absolute. The subsequent words, which are of a very vague and loose description, are not sufficient to cut down this absolute gift. The subsequent words, if they apply to this gift, refer only to the death of the sons within a given time; that is to say, in the lifetime of the testatrix, or of the person to [*589] whom their interest is postponed. You cannot “impute to the testatrix the intention of cutting down the £4000 gift to the event of the sons not surviving Maria Theresa. If the contingent gift of £12,000 is made subject only to the contingency of their dying without issue in her lifetime, why should the £4000 gift be less absolute? Thirdly, the words “I earnestly wish,” &c., create no trust. And fourthly, the plaintiffs are entitled to the residue. Upon this point, as upon the second, the case of *Galland v. Leonard*(a) is applicable.

Sir *Walter Riddell*, for the defendants, the trustees.

Mr. *Simpkinson* and Mr. *Heathfield*, for the defendant James Young, contended that the plaintiffs were not now entitled to that sum, inasmuch as the defendant James Young might become entitled in an event which was clearly pointed out by the will, namely, both the other sons dying without issue in the lifetime of the survivor of the daughters.

Mr. *Cooke*, for the defendant Maria Theresa Young.

Mr. *Addis*, for the defendant Juliana Young.

Mr. *Russell*, in reply, referred to *Jeuour v. Jenour*,(b) and *Hoy v. Master*.(c)

(a) 1 Swanst. 161.

(b) 10 Ves. 562.

(c) 6 Sim. 568.

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THE VICE-CHANCELLOR.—I am of opinion, that, plainly, the testatrix only meant to appoint, in the way that she has appointed specially in the early part of the will, property to the extent of £18,000; and that, if the property exceeded £18,000, the excess is either appointed by the latter words of the will, for the same purposes as the residuary personal estate, or is unappointed: if unappointed, it *falls back upon the father's [*590] will. Under the father's will, Mrs. Young and her sister, Miss Martin, were, as I understand, the residuary legatees; I understand also that they were the father's sole next of kin; and, as to the share of Miss Martin, I am told that she has executed a deed, by which she has assigned her portion, if any, upon the trusts, and for the purposes, by which the residuary personal estate of her sister is affected. Therefore, in every view of the case, the surplus of the fund beyond the £18,000 belongs to the residuary personal estate of Mrs. Young. That deed, whether material or immaterial, I understand to be admitted as part of the case.

An observation was made by Mr. *Cooke*, with respect to the manner in which, in the latter part of the will, the testatrix mentions "any other property which I am, or may, or shall be entitled to under or by virtue of my said father's said will." She uses the word "other" there for the purpose of distinguishing what she there mentions from "the whole of the said portions or fortunes I have so directed, appointed, given, and bequeathed to or for the benefit of my said two daughters, as well originally as contingently, and contingently to my said sons." If a declaration, therefore, were wanting, in addition to what she has specifically said, there is here declaration plain, that that gift did not exhaust the whole of what she was entitled to under her father's will. For the reasons, however, which I have stated, it is not necessary to give an opinion whether these words appoint the surplus beyond the £18,000; for, whether they appointed it or not, that surplus falls into the residue.

There is one point which I have omitted to notice, namely, the question on the words of recommendation in the father's will. Questions sometimes arise, whether the words of recommendation are or are not intended to be obligatory, that is, to be

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words of injunction ; but I never knew such a question [*591] to be made where the testator has stated, as he *has stated here, that they are not to be considered as words of injunction. He has told you that they are to be considered as precatory words, and not otherwise.

With regard to the £4000, the testatrix gives a fortune of £18,000 equally between her two daughters, £9000 for each, settling each portion on them and their children ; but provides, that, if either of them shall die unmarried, £5000 of her portion shall go to increase her sister's fortune, to make it £14,000, and that the remaining £4000 shall go between two of her sons, being £2000 apiece. She then provides for the event of the second sister dying unmarried, or without leaving issue, and, in that event, gives £12,000 of her £14,000 to the two sons who before had the £4000, and £2000 to another son, named James, and in words giving of themselves the absolute interest to those sons, and not raising any difficulty. But the testatrix's will proceeds in these words :—"And if either of the said Thomas Arthur Young and George Young"—those are the two sons to whom she has given the £4000 in the first contingency, and the additional £12,000 in the second contingency—"should happen to die unmarried, or, after having married, without leaving any lawful issue in the lifetime of the survivor of my said daughters." Now to stop there for a moment, to whatever subject this clause applies, I am of opinion that I am not authorized by any rule of interpretation, to read those words, "in the lifetime of the survivor of my said daughters," as meaning anything but that which, literally and grammatically, and according to the ordinary use of language, they import. If either of those two sons "should happen to die unmarried, or, after having married, without leaving any lawful issue in the lifetime of the survivor of my daughters, then I direct, appoint, give, and bequeath"—what ? "The share or shares of the said Thomas Arthur Young and George Young." Now it must be recollected that this is only applied to the case of the death of one [*592] of the two sons ; but *she says, "the share or shares of the said Thomas Arthur Young and George Young," by which, therefore, she must mean that one son might have

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two shares, and then she goes on to say—"of and in the share or shares of my said daughter ~~and~~ daughters so dying unmarried, and without leaving issue, as aforesaid, unto the survivor of my said sons, Thomas Arthur Young and George Young, in case either shall die without leaving issue, as aforesaid." Now, if there were nothing more in the will, I should say that it would render it necessary to hold that she was here speaking of the £4000; but it is made still plainer, as far as anything can be plain on this will, by what follows: "Or if both my said sons, Thomas Arthur Young and George Young, should die unmarried, or, having married, without leaving such issue as aforesaid, then I direct, appoint, give, and bequeath the whole of my said two daughters' said shares and fortunes unto my said son James Young absolutely." I am of opinion, therefore, that, notwithstanding the words of absolute gift, in which the £4000 and the £12,000 were given before, both the £4000, which was directed to be received in the lifetime or the surviving daughter, and the £12,000, which could not be received until after the death of the surviving daughter, are included in this gift. The consequence is, that, one of the daughters being now alive, the £4000 cannot now be paid,—a conclusion which renders it necessary now to express any opinion on the point, whether the words beginning, "but I most earnestly wish," do or do not create a trust,—whether those words are or are not merely precatory. I see enough in this will to render it necessary to say that the £4000 cannot now be paid.

The next question is upon the residue of the estate, in giving which, she says, "I give and bequenth all the residue of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, to my said two sons, Thomas Arthur Young and George Young, "if both living [*593] at the time of my decease, in equal shares and proportions; or, if either of them should be then dead," that is, at her decease, "without leaving any issue, wholly to the survivor of them; and if they shall be then both dead," that is, at the time of her decease, "without leaving any issue, then wholly to my said son James Young; and if he shall be then dead," that is, at the time of her decease, "without leaving any issue, leav-

ing my said daughters, or either of them then living, then to and amongst my said daughters, or the survivor of them, equally, or to an only surviving daughter, if there should be but one living, upon the same trusts as hereinbefore declared with respect to their respective original portions or fortunes."

Now she has referred, simply and plainly to the time of her own death. She goes on—"But, nevertheless, I will and direct that, if either of my said daughters, or any of my sons should happen to die, leaving issue"—and I think, considering the place in which these words stand, that they immediately apply to the provisions that she has already made with respect to the event of dying in her lifetime without leaving children: and there is the connection of this clause with the preceding sentence, by the commencing words, "But, nevertheless." "But nevertheless, I will and direct, that, if either of my said daughters or any of my sons, should happen to die leaving issue, the issue of each of my said daughters and sons so dying and leaving such issue shall take their, her, or his respective parent's share of the provisions I have hereby made for my said daughters and sons respectively, equally, share and share alike, in case the parent or parents of such issue shall not have otherwise given or appointed the same."

Now here there are two different considerations: one is as to the extent of the word "provisions;" whether that is to be held as going beyond the residue of which she is here disposing [*594] sing. I think not; because the passage, as I have already said, commencing with the words "But nevertheless," is introduced in close connexion with the passage which precedes it, and for the purpose of qualifying that passage.

It is, I think, necessary to hold that the word "provisions" here means only the residue equally, share and share alike, "in case the parent or parents of such issue shall not have otherwise given or appointed the same." Those words create this difficulty: if it is to be held that the residue was vested absolutely in the sons, upon their surviving her, she may be thought to have supposed her sons capable of appointing in her lifetime the property that they were to take under her will, they dying before her. It is impossible for me to speculate on what this tes-

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tatrix did or did not mean, further than as the very language which she has used is liable to be construed. I am of opinion, that the two sons, Thomas Arthur Young and George Young, having survived the testatrix, are absolutely entitled to the residue.

A question then arose as to the manner of apportioning the costs of the suit.

THE VICE-CHANCELLOR directed that so much of the costs as related to the respective funds of £4,000 and £14,000 should be borne by those funds respectively, and that the other costs of the suit should be borne by the testatrix's residuary estate, including the excess of the appointable fund beyond the £18,000.

**GOODLESS v. WILLIAMS*.

[*595]

1843: Nov. 13th, 16th.

Where a person is seized of an estate in fee, defeasible by a conditional limitation, shifting use, or executory devise, the inheritance is not represented in this Court merely by the person who has the defeasible estate.

JOSEPH OWEN WILLIAMS, by his will, after bequeathing various pecuniary legacies, devised certain freehold tenements, and all other his real estate whatsoever, unto and to the use of Alfred. Iliff Goodless and John Robbins, their heirs and assigns, upon trust to pay the rents, issues, and profits of the same to his wife Mary Ann, for her life, in case she should so long continue his widow, to be by her applied in the maintenance of herself, and in the rearing, maintenance, and education of his children until they should severally attain the age of twenty-one years; and in case his said wife should happen to marry again, then to pay the rent of a certain house to his said wife for her life, and he directed the rents, issues, and profits arising from the other part of his freehold lands, hereditaments, and premises to be applied to the rearing, education, and maintenance of his children until

1843 — *Goodess v. Williams*.

the youngest or youngest surviving child should attain the age of twenty-one years ; and, when and as soon as that event should have happened, then upon trust to pay and divide such last-mentioned rents and profits during the lifetime of his said wife, and, whether she should then be his widow or not, unto and among his said children, share and share alike, if more than one, and if there should be but one such child, then to such one or only child ; and, from and after the decease of his wife, upon trust that they, his said trustees, and the survivor of them, his heirs and assigns, should stand seized and possessed of all and every his said freehold lands, messuages, tenements, hereditaments, and premises, and all other his estate and effects, in trust for all his said children, their respective heirs, executors, administrators, and assigns, as tenants in common, and not as joint tenants ; and, if there should be but one such child

[*596] *then living, in trust for such one or only child, his or her heirs, executors, administrators, and assigns ; and in case any or either of his said children should die in the lifetime of his said wife, leaving lawful issue, then he gave and devised the part or share or respective parts or shares of such deceased child or children unto his, her, or their lawful issue at the said age of twenty-one years, and to his, her, or their respective heirs, executors, administrators, and assigns, and the rents and annual proceeds thereof in the meantime he directed should be paid and applied in the rearing and educating of such issue ; and, in case there should be no such child or the issue of any such child living at the decease of his said wife, then he directed that they, his said trustees and the survivor of them, his heirs and assigns, should stand seized and possessed of his said freehold lands and hereditaments and other his estate and effects in trust for his three sisters, Maria Greensall, Elizabeth Jackson, and Jane Williams, their respective heirs, executors, administrators, and assigns, as tenants in common ; and, in case any or either of them, his said sisters should die in the lifetime of his said wife, leaving lawful issue, then in trust to stand seized and possessed of the share or shares of such of them, his sisters, who should so die, for such issue and their respective heirs, executors, administrators, and assigns, as tenants in common.

 1843.—*Goodson v. Williams.*

The testator died in August, 1842, leaving his widow and two infant children surviving him.

The personal estate of the testator being insufficient to satisfy his debts, this bill was filed by the trustees, who were also the executors of the testator, against the widow and infants, praying that all proper accounts might be taken of the testator's debts and effects, and that the real estate might be sold.

On the cause coming on for hearing,—

Mr. *Freeling*, for the defendants, objected that the *tes- [597] tator's three sisters should have been made parties to the suit; for, although the infants had at present a vested interest, yet that interest might be divested by their deaths in the lifetime of the wife.

Mr. *Haig*, for the plaintiffs.—Those in remainder will be bound by a decree against those who have the first estate of inheritance: *Cholmondeley v. Clinton*.(a) [*The Vice-Chancellor*.—Has that rule ever been extended to the case of an estate in fee, subject to be divested by a conditional limitation? The limitation to the sisters comes in destruction of the prior estate.] In *Hopkins v. Hopkins*,(b) Lord *Hardwicke*, after observing that at law a contingent remainder is required to vest within a certain time, in order that there may be a tenant of the freehold to perform the services due in respect of the land, &c., says, that that does not hold in the case of a trust or equitable estate, as the trustee is tenant of the freehold; and he adds, as a consequence, that, “let there be ever so many limitations in contingency upon the trust, it is sufficient to bring the trustees before the Court, together with the first person who has a remainder of an inheritance vested and the estate itself; and all persons that may hereafter become interested will be bound by the decree, unless there be fraud or collusion.” In *Cockburn v. Thompson*,(c) Lord *Eldon*, after mentioning the general rule, observes, that persons having present immediate valuable interests in the estate may be deeply affected by it. [*The Vice-Chancellor*.—Sup-

(a) 2 J. & W. 1.

(b) West, Rep. T. Hardw. 619; 1 Atk. 581. 590.

(c) 16 Ves. 396.

 1843.—*Gooden v. Williams*.

pose a woman of great age and without issue to be seised in fee of an estate, subject to an executory devise(a) in favor of A., in the event of her dying without leaving issue in A.'s lifetime.] That might possibly be an exception to the rule. [*598] *In these cases, the importance of the subject and general convenience are to be regarded: *Pelham v. Gregory*.(b)

THE VICE-CHANCELLOR.—It has always, I apprehend, been considered, that, where a person is seized in fee of an estate, having that seisin liable to be defeated by a shifting use, conditional limitation, or executory devise, the inheritance is not represented here merely by the person who has the fee liable to be defeated. If I were to hold otherwise in the present case, I think that a purchaser of the estate might object to the title.

After the case had been disposed of, *Fresling* mentioned *Brookfield v. Bradley*.(c)

 CLIFF V. WADSWORTH.

1843: November 6th.

One of several mortgagees compelled to pay the costs, and another refused his costs, of a suit to redeem the mortgage; and the interest on the mortgage money declared to stop on the day of the tender.

By indentures of lease and release, dated the 8th and 9th May, 1837, Charles Heape, in consideration of £550, conveyed certain freehold property to George Wadsworth, in fee, subject to a proviso for redemption, on payment of the principal money at the expiration of five years from the date of the indenture of release, with half-yearly interest in the meantime, on the 8th November and 8th May in each year. By the indenture of release,

(a) Cro. Jac. 590; 1 Eq. Ca. Abr. 187, pl. 4.

(b) 1 Eden, 518.

(c) Jac. 632

1843.—Cliff v. Wadsworth.

Mary Jabet, by the direction of Charles Heape, assigned to Jesse Wilkes the residue of a certain term of 500 years then subsisting in part of the mortgaged premises, in trust for George Wadsworth, and for better securing the principal sum of £550 and interest, and, subject thereto, in trust for Charles Heape, his heirs and assigns.

*By an indenture of assignment, dated the 8th May, [*599] 1837, Charles Heape, in consideration of £500, mortgaged certain chattel leaseholds to Wadsworth, which were made redeemable at the same period as the freeholds.

In July, 1837, George Wadsworth died, having, by his will, appointed Joseph Brittle Wadsworth, Jubal Hughes, and John Bott, a solicitor, devisees, trustees, and executors of all his real and personal estate; and in June, 1840, Charles Heape died, having, by his will, appointed the plaintiff, Thomas Cliff, and Henry Horton, (since deceased,) devisees, trustees, and executors of all his real and personal estate.

Disputes having arisen between Wadsworth, Hughes, and Bott, touching the receipt of the interest upon the mortgage debt, and Wadsworth's solicitors having given the plaintiff notice not to pay it to Hughes, the plaintiff became desirous of paying off the two principal sums of £550 and £500. He accordingly, as surviving trustee and executor under Heape's will, caused a notice in writing, dated the 12th October, 1841, to be served on Wadsworth, Hughes, and Bott, of his intention to pay off the principal sum of £550 and interest, on the 8th May, 1842, at the hour of twelve at noon, at John Bott's office in Newhall-street, Birmingham; and also a like notice, dated the 9th November, 1841, to be served on the same parties, of his intention to pay off the principal sum of £500 and interest, on the same day, at the same hour and place; and by such notices he informed them, that the drafts of re-conveyance and re-assignment of the mortgaged premises would be delivered to John Bott, or to such other solicitor as they should require, for perusal on their respective behalves.

In pursuance of the notices, the plaintiff caused a draft of a re-conveyance of the freehold premises, and also a draft of a re-assignment of the leasehold premises, to be prepared and for-

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warded to John Bott for his perusal, who, on the 28th [600] April, 1842, perused and approved of the *drafts, and returned them, so approved, to the plaintiff's solicitor.

On the 30th April the plaintiff caused the drafts to be forwarded to Messrs. Spurrier and Chaplin, the solicitors of J. B. Wadsworth, who, on the 5th May, 1842, returned them with their approval, together with the following letter:—"Paradise-street, 5th May, 1842.—Wadsworth's trustees to Cliff.—We have approved of these drafts, and our client will execute the deeds, provided the principal and interest be paid into Messrs. Moiliotts' bank, to the credit of the three executors, and provided our charges upon your present and former occasions be paid by your client, but upon no other terms. Our Mr. Chaplin is going to London to-day, and will not return until Monday; but if you can get the other executors to agree to the terms we have mentioned, our client will attend, with one of our clerks, to complete the business. We shall require to compare the recitals in the re-conveyance and re-assignment with the original deeds, and we shall require Thomas Cliff's title to be proved in the usual way, before we permit our client to execute the deeds in question. We have seen Mr. J. B. Wadsworth, and had his directions to write to you to this effect."

The plaintiff also caused the drafts to be sent to Mr. Haywood of Birmingham, the solicitor of Hughes, who, on his behalf, approved of them.

The plaintiff then caused engrossments to be prepared from the drafts; and the 8th May, 1842, falling on a Sunday, it was arranged that all the parties should attend at Bott's office, at twelve o'clock on Monday, the 9th, for the purpose of completing the business. Subsequently, however, Wadsworth's solicitor wrote to the plaintiff's solicitor, requesting that the meeting should be postponed until the 11th.

The appointment on the 9th was attended by the [601] plaintiff *and his solicitor, and by Bott, and Hughes and his solicitor. The engrossments were produced by the plaintiff's solicitor, for execution by the several parties, and he also produced and tendered the sum of £1155, for principal and interest, to Bott and Hughes, in bank-notes, and they ac-

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knowledge of the tender and the correctness of it. Hughes, however, who had possession of the title-deeds, and claimed some beneficial interest in the mortgaged property, refused to execute the deed, unless the interest was paid to himself, on his sole receipt; on which the plaintiff's solicitor asked Bott if he would join Hughes in a receipt for the interest, offering, on his so doing, to pay the money to Hughes; but Bott refused to sign any receipt, except on the deed. Neither Wadsworth nor his solicitor attended the meeting, and the parties who did attend separated without payment of the money or execution of the deeds.

A second appointment was then made by the plaintiff's solicitor with Bott, Hughes, and the solicitors of Wadsworth, for a meeting on the 11th May, 1842, which was attended by the plaintiff and his solicitor and Bott. After waiting a considerable time, the plaintiff's solicitor, in consequence of Wadsworth's not attending, went to the office of Messrs. Spurrier and Chaplin, his solicitors, where he saw Wadsworth, who said that he would not go to the office of Bott, or cross his threshold. The latter, on being informed of this expression, replied, "As Wadsworth refuses to cross my threshold, I decline crossing it to meet him." Wadsworth, however, having consented to go to Moiliott's banking-house, the plaintiff and his solicitor proceeded thither, taking with them the engrossments and the sum of £1155. Wadsworth and his solicitor met them there, but neither Bott nor Hughes came. After waiting some time, the plaintiff's solicitor went to the office of Messrs. Haywood and Webb, the solicitors of Hughes, where he was informed by one of the clerks that Hughes was in the office, but he did not see him. Soon afterwards he met *Mr. Haywood, who accompanied [*602] him to the bank, and told the plaintiff and Wadsworth that Hughes would not come.

The plaintiff then filed his bill against the three defendants, Wadsworth, Hughes, and Bott, praying that, upon payment by the plaintiff of the sums of £605 and £550 to the defendants, in full discharge of all principal and interest on the securities up to 9th May, 1842, the plaintiff might be declared to be entitled to redeem the premises; and that the defendants might be decreed to execute the engrossments, and to deliver over to the plaintiff

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all deeds, &c. relating to the mortgaged premises, and that the defendants might be decreed to pay to the plaintiff the costs of and occasioned by the suit; otherwise that an account might be taken of what was due to the defendants for principal and interest upon the mortgage securities, and that the plaintiff might be at liberty to redeem the mortgaged premises, upon payment of what could be found due upon taking such account.

The defendant Wadsworth having, by his answer, suggested that Jesse Wilkes, the trustee of the 500 years' term, was a necessary party to the suit, he was brought before the Court by amendment, and served with a copy of the bill, but did not appear.

Mr. *Russell* and Mr. *Cockerell*, for the plaintiff.(a)

[*603] *Mr. *Wigram* and Mr. *Armstrong*, for the defendant Wadsworth.

Mr. *Tennant* and Mr. *Jenkins*, for the defendants Hughes and Bott.

THE VICE-CHANCELLOR.—A mortgagor is entitled, like every other man, to be protected against litigious and unreasonable conduct.

This is a mortgage of freehold and leasehold estates which became vested in three persons, who are at once the devisees and executors. Notice is given to pay of the debt at the time

(a) In the course of the argument (which the reporter was unavoidably precluded from hearing,) a case of *Roberts v. Jeffereys*, before Sir John Leach, M. R., May, 1830, was cited. A full report of the judgment in that case will be found in the Law Journal, vol. viii. p. 137, from which it appears, that a mortgagee having refused to reconvey and deliver up the title-deeds, though the amount of the mortgage money and interest was tendered to him on the day on which the mortgage was redeemable, a decree was made against him with costs: and the money having been paid into Court, no interest was allowed to him subsequent to the tender. For a collection of cases in which mortgagees have either been refused their costs, or compelled to pay costs in suit instituted by the mortgagor, see Mr. *Hovenden's* note to *Lord Cranston v. Johnston*, 3 Ves. 170; 5 Ves. 277; 1 Hov. Supp. 355. See also *Wilson v. Cluer*, 4 Beav. 214; *Rider v. Jones*, ante, p. 329.

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appointed by the deed. The notice is regularly served ; drafts of the assignment and re-conveyance are prepared and transmitted ; they are approved ; engrossments are made on the footing of them, and the engrossments also are approved. The preliminary steps are all taken and completed before the day fixed by the notice and the deed. The day fixed is the 8th of May, which fell on Sunday, and it was therefore arranged that the meeting should be on Monday, the 9th, not the preceding Saturday, and should be at the house of Bott, a solicitor, who was one of the devisees. After this appointment had been made, one of the solicitors of one of the parties was unable to be there ; his partner wishes a variation ; to which they answer, that the appointment could not be changed without the assent of all parties. The meeting is held on the 9th May, at Mr. Bott's. This meeting is attended by the plaintiff and his solicitor, by Mr. Hughes and his solicitor, and by one of the solicitors of Wadsworth.

Upon the evidence, notwithstanding the denial in Mr. Hughes's answer, which I must take to be founded on a defective recollection, I consider myself bound to treat it as established, that Mr. Hughes, who had a partial beneficial interest in the money lent to the plaintiff's testator, *claims a right to [*604] receive so much as was composed of interest himself, and, in fact, declined to concur in completing the business on any other terms. This is objected to, and, as I understand, correctly objected to, on the part of Bott, and also on the part of Wadsworth ; and the meeting is adjourned to the 11th of May. On the 11th of May, neither Mr. Hughes nor his solicitor appears, and there was not, as I collect, any intimation that Mr. Hughes's views as to interest were changed. Information is then given, for the first time, that Mr. Wadsworth will not attend at the house or office of Mr. Bott. Mr. Bott, at whose house or office the meeting was to take place, (the most probable place of appointment, and it was fixed without objection,) says, with some degree of irritation, "If Mr. Wadsworth will not cross my threshold, I will not ; I will require that it be done at the original place fixed." An endeavor to effect an arrangement is made and a sort of adjournment is made to the banker's. Still Mr. Hughes does not appear.

It is not disputed that on the 9th of May the money was pro-

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duced, and would have been paid if there had been parties to receive and give a discharge for it. Whatever may be the law with regard to the power of one executor or joint tenant to receive money, here there had not only been a notice to pay the money, but there was a right in the debtor simultaneously to have the estate re-conveyed, which, as to the freehold estate, could only be re-conveyed by the three. On what took place on the 9th of May, and what took place and did not take place on the 11th of May, there was a refusal to receive the money on the condition which, under these circumstances, the debtor had a right to interpose. Under the circumstances, however the loss may ultimately fall as between the three mortgagees, that loss cannot fall upon the debtor, who did all that was incumbent on him, and was prevented from discharging himself of the debt by the act of some or one of the joint mortgagees. Interest, *as to him, from that day stopped, and it must therefore be declared that the interest did not continue to run from the 9th of May.

The next question is as to the costs of the suit. Whoever else may be to blame, the plaintiff is not to blame. He has not been wrong in any part of the matter, and, up to this time, he cannot be called upon to pay any part of the costs. Considering the notice that had been given, the attendance with the money, the preparation of the deeds, the settlement of the deeds, and the engrossment of them, I am of opinion that this is a suit the institution of which ought never to have been imposed on the plaintiff. He must receive the costs of this suit up to this time. I am of opinion that the blame is mainly and chiefly in Mr. Hughes, who made that plainly untenable demand, which necessarily had the effect of preventing the completion of the business. Viewing him as mainly and chiefly the cause of the suit, I must declare that Mr. Hughes is liable to pay the plaintiff's costs of the suit up to this time.

Mr. Wadsworth has not been so much in error as Mr. Hughes; but I have not heard any satisfactory explanation of Mr. Wadsworth's absence personally on the 9th and 11th of May. It must be recollected that his execution of at least one of the deeds was necessary to fulfil one of the conditions on which the plaintiff

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had a right to insist. It is impossible to say what influence or operation the presence of Wadsworth might have had. Had he been in the room, I conceive it possible that Mr. Hughes's views might have changed. An embarrassment was created by Mr. Wadsworth's absence, which his subsequent presence at the bank did not entirely remove or displace. Therefore, although Mr. Wadsworth has not so dealt with the matter as to render himself liable to pay the plaintiff's costs, neither is he to receive costs.

Bott appears to me substantially blameless. If there was an expression of momentary irritation, still it was an ex- [*606] pression naturally drawn from him. It indicated an intention which, perhaps, under the circumstances, he had a right to form. Mr. Bott ought to have his costs. They must be added to the plaintiff's costs, who will have them against Mr. Hughes.

DECLARE, that, under the circumstances in the pleadings of this cause, mentioned, the interest on the two several sums of £550 and £500, the respective amounts of the mortgage monies in the pleadings mentioned, did not continue to run from and after the 9th May, 1842. Declare, that the whole amount of the said principal sums, and interest due and to be paid thereon, is the said sum of £1155. Refer it to the taxing Master to tax the defendants, J. B. Wadsworth, Jubal Hughes, and John Bott, their charges and expenses (if any) properly incurred by them, or any or either of them, in respect of the several mortgages in the pleadings mentioned, previously to the 12th May, 1842, in case the parties differ about the same, and let the taxing Master certify the amount thereof. Declare, that, upon payment by the plaintiff, Thomas Cliff, to the said defendants, J. B. Wadsworth, Jubal Hughes, and John Bott, of the said sum of £1155 for such principal sum and interest as aforesaid, together with such charges and expenses, when so taxed or agreed upon, the said plaintiff is entitled to have the engrossments of the deeds in the pleadings mentioned (marked respectively with the letters E and F) executed by the said defendants, J. B. Wadsworth, Jubal Hughes, and John Bott. Upon such payment of the said sum of £1155, and of the said charges and expenses, order that the said defendants, J. B. Wadsworth, Jubal Hughes, and John Bott, do re-convey and re-assign the mortgaged premises in the pleadings mentioned to the said plaintiff, Thomas Cliff, by executing the said engrossments of the said deeds, marked respectively with the letters E and F. Thereupon, also, order, that the said defendants, J. B. Wadsworth, Jubal Hughes, and John Bott, do deliver to the said plaintiff, Thomas Cliff, upon oath, all deeds and writings in their, or any, or either of their custody or power, relating to the said mortgaged premises. Refer it to the taxing Master to tax the plaintiff and the defendant John Bott their costs of this suit up to this time, and certify the amount thereof. Let the plaintiff pay to the defendant John Bott his costs of this suit, when taxed, and let the costs of the defendant John Bott be added to the plaintiff's costs of

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the suit. Order that the costs of the plaintiff, together with what he shall so pay to the said defendant John Bott be paid by the said defendant Jubal Hughes. Reserve subsequent costs.

[*607]

*CAMPBELL V. CAMPBELL.

1843: November 17th. December 16th.

By a decree made in a suit for administering the assets of a testator who died in India, the Master was directed to allow Indian commission to the executor only in respect of assets received by him while resident in India. The testator (whose estate was solvent for the payment of legacies) died possessed of certain notes of the Bengal Government, which the executor took from the Treasury at Calcutta, and handed over to certain trustees, in discharge of a legacy of the testator of equal amount with the notes :—*Held*, that the notes were assets within the meaning of the decree.

Discussion as to the conclusiveness of the dates contained in the schedule of accounts annexed to a Master's Report.

CHARLES HAY CAMPBELL, a Major in the East India Company's service, made his will in India, dated the 10th October, 1831, by which after bequeathing certain legacies, he directed that the residue of his estate should be held in trust for the benefit of his wife and children ; and he nominated his brother George Gunning Campbell, and three other brothers, who were named, his executors and trustees, to whose care and protection he most urgently recommended his said children and wife.

The testator died in India, on the 19th May, 1832. His will was proved by George Gunning Campbell alone, first at Calcutta, on the 10th August, 1832, and afterwards in England, on the 29th January, 1836.

Shortly after the arrival of the testator's widow and children in England, the present suit was instituted on their behalf, as plaintiffs, against George Gunning Campbell, for the purpose of having the accounts of the testator's estate taken ; and by the decree made at the hearing of the cause, on the 7th May, 1836, it was referred to the Master to take the accounts, and the defendant was decreed to pay the balance then in his hands into the

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Bank, and collect and get in the residuary personal estate of the testator outstanding in India, and pay the same into the Bank to the credit of the cause.

It appeared, from the Master's general report, dated the 4th July, 1840, that, in taking the accounts, he had allowed the defendant to retain Indian commission at the rate of five sicca rupees per cent. upon the whole of the testator's assets, notwithstanding that a considerable portion of them were not realized, nor the produce received, until after the defendant had left India, which was on the 3rd March, 1833. Exceptions were accordingly taken to that report by the plaintiffs, which, after argument before *the *Vice-Chancellor of England*, in July, 1842, were al- [*608] lowed, the Court referring it back to the Master to review his report, with a declaration, that, in making an allowance for Indian commission, the Master was only to make such allowances in respect of the assets received by the defendant, as executor whilst he was resident in India.

In pursuance of the order of the *Vice-Chancellor of England*, the Master made a further report, whereby, after stating the amount of the defendant's claim for commission, which was founded on a charge, (supported by evidence,) that, by the laws and customs of India, executors and administrators of persons dying in India are entitled to an allowance or commission of five rupees per cent. on all sums received by them, or for which they are chargeable in their accounts of assets, without distinction, whether the same consists of money or securities for money, he, the Master, certified, that, upon consideration of such claim, &c., and having referred to the declaration in the order of July, 1842, he was of opinion that the defendant was entitled only to commission on the several sums of money actually collected and gotten in by him, or by any person or persons by his order, or for his use, whilst he was resident in India.

The defendant then took several exceptions to the last-mentioned report, which exceptions now came on for argument.

Mr. *Russell* and Mr. *Glasse*, for the exceptions.

Mr. *Swanston* and Mr. *James*, for the report.

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The first exception was to the effect that the Master had not certified that the defendant was entitled to commission, at the rate allowed to executors of persons dying in India, on 24,000 rupees, invested in securities of the Bengal Government.

The testator, by his will, directed 24,000 rupees to be [*609] held in trust by his executors for his three illegitimate children named in the will, (who, it appeared, were by a native woman,) in equal shares; but, in case of the death of any or all of the same children before they should respectively attain a certain age, he directed that the share or shares of the child or children so dying should revert to and lapse in his residuary estate.

After the death of the testator, the defendant took from amongst his securities, deposited in the treasury of Calcutta, three notes of the Bengal Government, of the value of 8000 rupees each. Notes of this description are the currency of the country, and pass from hand to hand, unless specially endorsed. The defendant did not convert the three notes in question into cash, but transferred them, unendorsed, to the Bengal Orphan Asylum, in satisfaction of the before-mentioned legacy. The asylum is a public institution, sanctioned by the government, for the wardship, maintenance, and education of the illegitimate children of European officers by native women. On the death of one of the children under the age of twenty-one, and after the defendant had left India, one of the Bengal notes was returned to him by the society, and he thereupon invested the produce in the funds of this country, for the benefit of the residuary legatees.

The Master disallowed the claim for commission on the 24,000 rupees secured by the notes, on the ground, as it appeared, that the securities were not actually converted into cash by the executor while resident in India.

In support of the exception, it was argued, that the three notes so dealt with by the defendant were assets of the testator received by him while resident in India; and that the commission claimed by the defendant was payable in respect of all assets received

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by an executor in India, whether in the shape of securities or cash: *Cockerell v. Barber*.(a)

*For the report.—The handing over these notes to the [*610] society was a breach of trust in the defendant, and is distinguishable from the case of a private bond handed over by an executor to a creditor in discharge of a debt. Besides, no assets were here realized. The defendant did not endorse the notes, and it is doubtful whether they are payable to bearer. When received by the executor, they were not assets, but only the symbols of assets; and when they were transferred to the society, the transfer was merely a provisional transfer, and not an absolute conversion into money. When one of the children died, a re-transfer of one of the notes was made to the defendant, *modo et forma* in which he had made the transfer, and it has been converted since he left India. The same thing may occur if either of the other children die under age. The utmost that the defendant can claim is commission on 16,000 rupees, if the other children attain their majority.

THE VICE-CHANCELLOR.—It has already been decided in this Court, by the Judge by whom this cause was originally heard, that, in making the defendant allowances for Indian commission, the Master is only to make such allowances for assets received by him while resident in India. That decision, for every purpose of this cause, I consider as binding me. I read it as involving a declaration, that, in respect of assets received in India, George Gunning Campbell is entitled to receive commission at the rate of 5 per cent.

The question, therefore, is, whether the sum of 24,000 rupees was part of the assets received by George Gunning Campbell, as executor, while resident in India. It appears that the testator was owner, at the time of his death, of certain promissory notes of the Government of Bengal, to an amount of many thousand rupees, the estate being considered (and truly, it is to be supposed) as solvent for payment of all the legacies. The defendant, Campbell, appears to have taken from the mass of the

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[*611] promissory *notes of Bengal of the testator, deposited in the Government treasury at Calcutta, promissory notes to the amount of 24,000 rupees. He appears to have so taken them in appropriation and discharge of certain legacies to that amount, given to the three illegitimate children of the testator by a native woman, subject to a limitation over in case of the death of either of them during minority. I must, upon the whole evidence taken together, consider that these were promissory notes, available, as soon as in the executor's hands, for every purpose of the administration, as cash. In truth, he did appropriate them to the discharge of these legacies ; but, after receiving them from the treasury of Bengal, he might have changed his mind, and appropriated them to other purposes in the administration of the estate ; they being, as I have said, for every purpose of this cause, available as cash, as much as the Bank of England notes of this country, and perhaps more so—being more in the nature of Exchequer bills, which constitute a debt from the Government. It appears to me, therefore, upon every fair interpretation of the term, that the notes for 24,000 rupees were so much assets ; and with deference to the Master, I find it impossible to say that this taking possession of them by the executor was any thing else than a receipt of assets to that amount.

But the case does not stop there, for the defendant actually applied the notes in question in discharge of the legacies, by handing them, according to the custom in India, to the managers of the Bengal Orphan Asylum, who, it appears, take charge of infants and their fortunes to a certain extent. Whether this payment was strictly regular or not, it appears that, in the accounts taken in this suit, and allowed by the Court, he is charged with the sum of rupees so received, as if in coin and not in paper. So he stands charged. He also appears to be discharged by the payment of this sum to the institution. That must be taken to be a good discharge—the sum being applied in India in a course of due administration. I think, therefore, [*612] *that I cannot hold otherwise than I have said, without going against the *Vice-Chancellor's* order and the case of *Cockerell v. Barber*.

Exception allowed.

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The second exception proceeded on the ground that the Master had not allowed the defendant the like commission upon a sum of 42,900 rupees invested in like securities.

The reason for the Master's disallowance of this claim appeared to be similar to that on which he acted in the preceding case, viz., that, although the securities for the 42,900 rupees were possessed by the defendant while he was resident in India, they were not sold or converted into cash until after he had ceased to reside there.

It was stated in an affidavit of the defendant, and did not appear to be disputed, that, before he left India, he took possession, as executor of the testator, of nine notes of the Bengal Government, to the amount of 42,900 rupees, which he handed over to certain agents of the name of Casement and Battine, who received interest on them until they were sold in April, 1836. The Master also, by his report, found that the amount with which he had charged the defendant in his former report (on which he had allowed 5 per cent. commission) consisted in part of these specific securities. The defendant, however, was not, by either of the reports or the schedules to them, specifically charged with the receipt of the notes, although the schedules to the former report contained charges of interest on them until April, 1836. The only charge in relation to the principal money comprised in these securities (and which also related to the produce of some additional securities) was contained in the fourth part of the schedule to the former report, and was in these terms:—"1836, April 30.—Receipts in India by Colonel Casement and Colonel Battine for Bills sold S. R. 51,135. A. 4."

In support of the exception, it was argued that the principles on which the Court had disposed of the former exception "must apply to this; these securities having been, [*613] as soon as they were received by the defendant, available to him as cash.

For the Report.—The defendant stands charged in the accounts with S. R. 51, 135. A. 4, on the 30th April, 1836, which was not till after he left India. He is charged in no other manner for the principal. That charge has not been made the subject of excep-

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tion, and is conclusive against him. In order to furnish grounds for an exception of this nature, he should have been charged as in 1833, and for the notes. [*The Vice-Chancellor*.—Your argument is, that the date and form of the account exclude the notion that he became chargeable with this particular amount at an earlier period.]

A discussion then ensued as to the extent, generally, to which a defendant is bound by the statement of dates in the schedule of a Master's report, made in pursuance of the usual decree for taking the accounts of a testator's estate: and as to whether, upon a reference back to the Master to make rests and compute interest, the dates annexed to the schedule of the report are considered conclusive as to time: *Seton on Decrees*, 50, 247.

THE VICE-CHANCELLOR said that this demand appeared to him to have the character of harshness; nevertheless, if it was legally due, it would be the duty of the Court to accede to it. If the question turned entirely upon the affidavit, comparing that evidence with the language of the order of the *Vice-Chancellor of England*, he should be under the necessity of saying, that the sum in question was part of the assets received by the defendant while resident in India. Upon the other point, however, which had been argued, he should give his opinion, if called upon to do so, on a future day.

[*614] *Dec. 16th.—THE VICE-CHANCELLOR.—I disposed of the exceptions in this case at Westminster, during the last term, except as to one point—as to the question, namely, whether George Gunning Campbell ought to be allowed the commission claimed by him upon a sum which, by a report confirmed, appears to have been remitted to him, and either to have come or not come to his hands while resident in India. I will assume that it did come to his hands in India.

It has been argued, that the report, confirmed as I have said, is conclusive upon the point, at least, as matters now stand. This is a question upon which I do not find it necessary to pronounce any judgment. I have been favored, however, by a most experienced Master, with an opinion as to the conclusive-

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ness of dates in the schedules to a report made under a decree in an administration suit of the ordinary kind, which may be thought to bear upon the argument. It is thus :—

It is the practice of the Masters, in their schedules of receipts and payments, to state the dates of such receipts and payments. On a reference back to the Masters, to ascertain balances and compute interest, they do not consider the dates as stated in the schedules to their reports as conclusively proved, but only as proved *prima facie* ; and if the accuracy of those dates should be questioned, they would proceed to inquire into them by further examination of the defendant, or by evidence produced on the part of plaintiff. It is presumed that such is the intention of the Court, when the direction to the Master is to *ascertain* balances ; and that when the Court does not intend this inquiry to be gone into, the reference back would be for the Master to compute interest on the balances appearing on his report, and the schedules thereto.

This opinion is confirmed by two other Masters.

But, however this may be, in a case such as the present it seems to me, assuming the point to be open, that I ought to have perfectly satisfactory evidence of the incorrectness of the schedule, before I act against it. There is [*615] not, I think, evidence of that description here, and I think it right to abide by the schedule, and to disallow the particular commission now in question. It would not, in my judgment, be consistent with a due regard to all the circumstances of the case, either to send it upon this point back to the Master, or to keep the point open.

Exception overruled.

1843.—White v. Wood.

WHITE V. WOOD.

1843 : November 15th.

A person who had refused to pay the rent of a sequestered estate, which he occupied as tenant to the sequestrators, except under an indemnity, was nevertheless held entitled to his costs of a motion by the sequestrators, to compel payment of the money.

THE estate of the defendant, T. Wood, had been sequestered.

Mr. *Piggott* for the plaintiff, now moved that Henry Rogers, the tenant of the estate, might be ordered, within seven days after service of the order, to pay to the sequestrators, or into the Bank, with the privity of the Accountant-General, the sum of 16*l.* 1*s.* 3*d.*, admitted by Rogers to be due from him to the defendant for arrears of rent. It appeared that Rogers had offered to pay the amount to the sequestrators on their giving him indemnity, which they had declined to do.

Mr. *Bird* for *Rogers*, made no objection to the payment of the money, but submitted, that, as his client had offered to pay the money on indemnity, he ought to have his costs of the present application : *Wilson v. Metcalfe*.^(a)

Mr. *Piggott*, in reply.—In the case cited, the defendant threatened to distrain if the tenant would not pay. It is clear that Rogers ought to have been satisfied with the order of sequestration as a sufficient indemnity.

[*616] *THE VICE-CHANCELLOR.—Without giving a positive opinion on the point, I think it was so fairly a matter of question, whether Rogers could have safely paid the money without indemnity, that the plaintiff should pay the costs of the present motion.

(a) 1 Beav. 263.

1843.—*Masters v. Barnes.*

MASTERS V. BARNES.

1843: December 12th.

In an administration suit against a surviving executor, it is not necessary, in all cases, to bring before the Court the representative of the deceased executor.

FRANCIS RYLEY, by his will, dated in September, 1818, bequeathed all his personal estate to his friend, Thomas Ryley, upon trust to apportion, pay and apply the same as follows:—viz. one third to his sister Hannah absolutely, another third for the use of his sisters, Elizabeth, Hannah, and Mary Ann Barnes, in manner in the will mentioned, and the remaining third for the benefit of Mary Ann Barnes, and her son William Barnes, as therein also mentioned. The testator appointed the said Thomas Ryley his executor; and, in case of his declining the executorship, he appointed his sisters Hannah and Mary Ann, and the survivor of them, his executrixes and executrix.

The testator died soon after the date of his will, leaving the several persons named therein surviving him. Hannah afterwards married the plaintiff and died; whereupon the plaintiff took out letters of administration of her personal estate. Elizabeth also died, having bequeathed her interest to her nephew, William Barnes, whom she appointed her executor.

The testator's will was, in the first instance, proved by Thomas Ryley. After his bankruptcy, however, it was proved by Mary Ann Barnes, as the surviving substituted executrix of the testator, in the Consistory Court of the Bishop of Lichfield and Coventry.

The bill was filed against Mary Ann Barnes and William Barnes. It prayed that the trusts of the will might be "carried into execution, and the rights of the parties interested therein declared, and for the usual relief in an administration suit. [617]

The bill, after alleging (which was denied by the defendants) that Thomas Ryley and Mary Ann Barnes took upon themselves *jointly* the execution of the will, contained the following allegations, which were admitted by the defendants:—That, at the

 1843.—*Masters v. Barnes.*

time of Thomas Ryley's bankruptcy, there was due and owing from him, on account of the estate of said testator, the sum of 269*l.* 18*s.* or thereabouts; that the defendant Mary Ann Barnes duly proved the amount of the said debt under the commission against Thomas Ryley; that several dividends had been declared under said commission of the said bankrupt's estate; that some time ago a final dividend was declared thereof, and that all the dividends which were due in respect of the said debt of 269*l.* 18*s.* were duly paid to the said Mary Ann Barnes; that the said Thomas Ryley died intestate, shortly after the date of the said commission; that all his estate was duly administered under the said commission, and that he died wholly insolvent.

The bill further alleged, what was neither admitted nor denied by the answer, that no letters of administration of the estate and effects of Thomas Ryley had been granted to any person whatsoever, and that he had no legal personal representative.

The defendants, by their answer, alleged that sums of money, belonging to the estate of the testator Francis Ryley, were mixed up by the said Thomas Ryley with other monies not belonging to the estate of the said testator, and were invested by him in securities, in his the said Thomas Ryley's own name, without any trust thereof being declared, and are principally still so outstanding. And the defendants submitted, that, under these circumstances, the assignees of Thomas Ryley were necessary parties to this suit, if the same should be proceeded with.

No evidence was entered into on either side.

[*618] *Upon the cause coming on for hearing.

Mr. *Metcalf*, for the defendants, submitted, that, if the cause were proceeded with, the assignees would be necessary parties. If the administration accounts are taken, there will be no party present to represent that part of the testator's estate which is alleged by the answer to be *now* outstanding in Thomas Ryley's name. [*The Vice-Chancellor*.—There being no evidence, the question is very much in the discretion of the Court.] Although no evidence has been entered into, there are sufficient materials in the answer for the Master to proceed upon. The schedule to

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the answer states the various property of the testator. It includes (though it must be admitted that the mortgage deeds are not in Court) a mortgage taken in the name of the testator. Now, the assignees may or may not be called upon to claim that mortgage; it would be convenient, therefore, to say the least, to bring them before the Court.

Mr Russell and *Mr. Cockerell*, for the plaintiff, contended that the admissions in the answer, that a final dividend had been received under the bankruptcy of *Thomas Ryley*, and that he had died wholly insolvent, rendered it unnecessary to make his assignees parties.

THE VICE-CHANCELLOR, in the course of the argument, observed, that, in cases of this description, the question whether a person *must*, and the question whether he *may*, be made a party, are different. There was, indeed, a case which he believed had gone the length of deciding that where a bill is originally filed against two executors, and one dies, a new bill in the nature of a bill of revivor, or revivor and supplement, cannot be brought against the personal representative of the pre-deceased executor. That was a strong decision. The present, however, was not that case. This was the case of a bill filed, after the decease of one executor, against the surviving executor, and his [*619] Honor was not aware of any authority which made it compulsory to bring before the Court the personal representative of the pre-deceased executor in a case of that description.

It was observed at the bar, that, if the decision to which the *Vice-Chancellor* had referred was that of *Phelps v. Sproule*,^(a) it had been dissented from by Lord *Brougham* in *Holland v. Prior*.^(b)

THE VICE-CHANCELLOR then referred to the case of *Williams v. Williams*,^(c) and observed, that the first reason there given by Lord *Hardwicke* for having the representative of the

(a) 4 Sm. 321.

(b) 1 Myl. & K. 237.

(c) 9 Mod. 299.

 1843.—*Masters v. Barnes.*

deceased executor before the Court did not apply here, but that, from the subsequent remarks of his Lordship, it might seem to have been his opinion, that, in all cases, the personal representative of the deceased executor should be before the Court.

Mr. *Russell* suggested that the observations of Lord *Hardwicke* were made in answer to the argument of Mr. *Wilbraham*, and were addressed only to the case where it is sought to charge the estate of the deceased executor.

THE VICE-CHANCELLOR.—I will not say that the personal representative of Thomas Ryley might not have been made a party to this suit; but the question is whether, in a case such as this, the plaintiff is compelled to make the assignee and personal representative of the deceased executor parties. I am disposed to think, that, construing Mr. *Wilbraham's* observations in connexion with those of Lord *Hardwicke*, Mr. *Russell's* interpretation of the case of *Williams v. Williams* is right. Upon [*620] the whole, I think that I may venture to decide that the plaintiff is not compellable to make either the assignee or personal representative of Thomas Ryley a party to this suit. Let it be observed, however, that I do not decide this on the authority of the case in 4th *Simons*. I give no opinion upon that case at all.

KENNINGTON V. HOUGHTON.

1843: December 7th, 8th.

Account between tenant and landlord under a husbandry lease.

By an indenture of lease, dated the 20th January, 1840, and made between the defendant, of the one part, and the plaintiff, of the other part, the defendant, in consideration of the covenants therein contained on the part of the plaintiff, &c., demised to the plaintiff, his executors, administrators, and assigns, a certain mes-

1843.—*Kennington v. Houghton.*

suage, and 862 acres of land in the parish of Wokingham and adjoining parishes, with the appurtenances, except as therein mentioned, to have and to hold said premises to the plaintiff, his executors, administrators, and assigns, from the 29th day of September then last past, for the term of twenty-one years thence next ensuing, (determinable nevertheless, at the option of the defendant, as to the messuage and adjoining grounds, at the end of the first fourteen years of the term,) at the rent of £500, payable quarterly on the usual quarter days—the first of the said quarterly payments to be made on the 25th day of December then next ensuing. The indenture contained covenants on the part of the plaintiff for payment of the rent and of all rates, taxes, &c., and also for the payment of the corn rent, payable in lieu of tithes; and that the plaintiff, his executors, &c., would, within the first three years of the term thereby granted, in a good and husbandry-like manner, break up and double plough at least 300 acres of such parts of the demised lands as were then heath, and at all times, during said term thereby granted, cultivate and improve *the said lands so to be broken up as [*621] aforesaid in a good husbandry-like manner; and also would, at his or their own costs and charges, on notice being given to him or them as therein mentioned, fetch and carry the lime to be provided by the defendant, and lay the same on the land, &c., and would, during the first two years of the said term, lay out and invest the sum of £500 in the purchase of bones or nitrate of soda, and at his or their own costs and charges, fetch and carry, and lay and spread, the same to, upon, and over such parts of the demised premises as should most require the same. And the defendant thereby, for himself, his heirs, executors, and administrators, covenanted with the plaintiff, his executors, administrators, and assigns, (amongst other things,) that he the defendant, his heirs or assigns, would, within the first two years of the said term, lay out and expend in the improving the said demised premises the sum of £2000, to be paid and applied in manner following, (that is to say,) the sum of £600 to be paid to the plaintiff his executors, &c., for breaking up and double ploughing the heath land thereinbefore covenanted to be broken up and ploughed by him or them as aforesaid, such payment to

 1843.—*Kennington v. Moughton.*

be made by equal portions within one calendar month next after every twenty acres of the same lands should be so broken up and ploughed, at the rate of £2 sterling per acre: the sum of £400 to be paid for lime for the lands which should be so broken up as aforesaid, such lime to be provided by the defendant, his heirs or assigns, within the distance of four miles from the said demised premises: the sum of £400 to be expended in building on the demised premises, (the bricks then upon the said premises being used and taken in part of such sum of £400;) the sum of £100 to be expended in under-draining and fencing; and £500 to be paid to plaintiff, his executors, &c.; in respect of the like sum thereinbefore covenanted to be laid out and expended by him in

the purchase of bones or nitrate of soda for the said demised premises; [*622] such last-mentioned sum to be paid or allowed out of the rent which should become payable in respect of the said demised premises, on reasonable and satisfactory proof being given to the defendant, his heirs or assigns, that the covenant lastly thereinbefore referred to had been duly performed. The lease contained a proviso for re-entry by the landlord and determination of the lease under various circumstances, and amongst others, in case the tenant should at any time during the demise become insolvent, or attempt to take the benefit of any act passed for the relief of insolvent debtors, or in case any extent, execution, or other legal process should be issued against him, by virtue of which the lease should be liable to be taken or disposed of.

Upon the treaty for this lease it was also agreed that the plaintiff should take the stock and crop upon the farm at the sum of £2000, and that, to secure the payment thereof, he should execute a warrant of attorney, upon which judgment should be entered up against him, at the suit of the defendant, in the sum of £4000. A warrant of attorney, bearing even date with the lease, was accordingly executed by the plaintiff.

The plaintiff entered into possession under the lease, and proceeded, as he contended, to perform the covenants in full. According to the allegations in the bill, he laid out £500 in manure, though not entirely in bones and nitrate of soda, there being, as he alleged, an understanding between him and the defendant

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that other manure might be used. He likewise alleged that he had beaten up and double ploughed 250 acres of heath land; that he had expended £129 in under-draining; that he had carted clay to the amount of £110; that he had paid several tradesmen, for work done and materials furnished for the defendant, £58; that he had paid to one Howes, for work done for the defendant in respect of his building covenant, about £262; and that he had sold and delivered to the defendant stock to the amount of £285. The last two allegations *were re- [*623] spectively met by the defendant by claims of set-off; in one instance by means of drafts for £330, the balance being carried to the draining account; in the other instance by means of materials furnished to the plaintiff. The previous allegations were admitted by the defendant, except in respect of the amount of the monies expended and the number of acres ploughed, and except that the defendant denied the alleged understanding as to the manure, the existence of which, however, was proved by two witnesses for the plaintiff.

On the 25th January, 1841, the plaintiff called upon the defendant, and stated that he should be unable to continue the farm on the terms upon which he had agreed to take it; upon which the defendant, according to his own admission, said, that, if the plaintiff would chalk or lime the double ploughed land, he would allow the amount of one year's rent for that purpose. The plaintiff's statement of this matter was, that he was, to be allowed two years' rent, no interest on the £2000 during that time, and some other advantages. At this meeting the plaintiff delivered to the defendant an account of his expenditure on the farm, by which a balance of £522 appeared due to the plaintiff, exclusive of any charge for manure or double ploughing. On receiving the account, the defendant, though he did not, as he said, admit its accuracy, yet, according to his own admission, stated, that "it was not convenient for him to pay the amount thereof until the plaintiff paid him £500, part of the £2000 agreed to be paid by the plaintiff for the stock."

In March and May, 1841, the defendant paid to the plaintiff three several sums of £100, £30, and £100, but as he said,

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"on account generally," and not on account of the alleged balance of £522.

On the 14th June, 1841, the plaintiff delivered to the defendant a further account of his demands, by which it *appeared, that, after giving the defendant credit for £230, the balance against him was £953, exclusive of any charge for manure. On this occasion the plaintiff stated, that, in consequence of his crops having been greatly damaged, and his having then lately experienced other losses, he was afraid he should not be able to meet his engagements; and he requested the defendant to pay him the balance of the account between them in order to enable him to compound or settle with his creditors; and he offered, if the defendant would pay him such balance for such purpose, to give up the farm with every thing upon it, in satisfaction of the £2000 secured by warrant of attorney. To this proposal, according to the plaintiff's representation of the case, the defendant assented. The defendant, however, by his answer, denied such assent, but admitted that he might have said that it was the best thing the plaintiff could do, and that he also proposed or assented to employ the plaintiff as his bailiff, if they could come to terms.

On the 15th June, 1841, the plaintiff being pressed for money to satisfy an attachment in the Court of Chancery, again applied to the plaintiff for payment of the £953, the balance of the account, when the defendant replied that nothing was due to him. After some angry discussion on that and subsequent days, the following arrangement, as the plaintiff insisted, was made between the parties—that the plaintiff should go to France; that the defendant should pay certain of the plaintiff's creditors in full, and settle with others, and also dispose of the matter in Chancery; that the defendant should secure the return of the plaintiff from France in three weeks; that the plaintiff should then go back to the farm and resume the tenancy, and that the defendant should let him have the stock and other articles on the farm at the sheriff's valuation, and provide him with money to go on with.

On the 18th June, 1841, and, as the plaintiff in [*625] sisted, in pursuance of the foregoing arrangement, the

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defendant caused judgment to be signed against him under the warrant of attorney, and on the same day issued a *fi. fa.* thereon upon the plaintiff's goods, under which he received from the sheriff £1788 after payment of poundage. On the following day, in further pursuance, as the plaintiff alleged of the same arrangement, the defendant distrained the goods on the plaintiff's farm for £750, as for a rears of rent for a year and a half. Immediately after the distress the plaintiff signed two authorities to the defendant's solicitors, under which they were authorized to hold the distrained goods beyond the five days, and the defendant was at liberty to buy the stock at the sheriff's valuation. On the 20th June the plaintiff went to Boulogne, where he remained till the end of July. He never returned to the farm, but about the time of his return to England, the defendant took possession of it.

The bill alleged that the execution and distress upon the plaintiff's goods, and his departure into France, all took place in pursuance of the arrangement which has been mentioned; that, on the faith of that arrangement, the plaintiff acquiesced in the defendant's proceedings, and that, in fact, by the terms of the lease, only one half-year's rent was due at the time of the distress, against which the plaintiff was entitled to set off the amount laid out by him on the farm; that, nevertheless, the defendant, in breach of the arrangement, never saw or communicated with the plaintiff's creditors, and never intended to come to any arrangement with them. The bill also contained various charges relating to the accounts between the parties.

The bill prayed, that, as between the plaintiff and defendant, the distress and execution, and the proceedings thereunder, might be declared void in equity, and might be set aside, and that the sheriff's assignment to the defendant might be delivered up to be cancelled, &c., and that the defendant might be decreed to put the plaintiff in "possession of the farm [626] and premises(a) and of the stock, and that an account might be taken of the dealings and transactions between the

(a) As to the jurisdiction of the Court of Chancery in decreeing possession of real estate, see the note to *Vice v. Thomas*, 4 Y. & C. 650.

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- plaintiff and the defendant on the footing of the lease and of the agreements subsequently come to between the parties, and for an injunction to restrain the defendant from selling or disposing of or parting with the stock and crops, and from taking further proceedings against the plaintiff on the judgment.

The defendant, by his answer, denied that any such arrangement as that contained in the bill had ever been entered into. He submitted, that no account was necessary, or ought to be entered into between the parties; nevertheless, he was ready to account as the Court should direct, though, if an account were taken, he submitted that it should be at the plaintiff's expense.

The plaintiff entered into evidence principally for the purpose of showing that the farm had been properly cultivated while in his hands, and that the defendant had, on some occasions, expressed strong approbation of the manner of cultivation.

The cause now came on for hearing.

Mr. Simpkinson and *Mr. Heathfield*, for the plaintiff.

Mr. Russell and *Mr. Hansard*, for the defendant.

Upon the question of account the cases of *Dinwiddie v. Bailey*(b) and *O'Connor v. Spaight*(c) were cited.

THE VICE-CHANCELLOR observed that the warrant of attorney and judgment not having been successfully impeached, the lease had, in consequence of the execution under the judgment [*627] and the insolvency of the plaintiff, been determined, and therefore he should decline interfering with the possession of the farm or the stock, and should dismiss the bill so far as it sought relief in those respects. His Honor then, after disposing of another point in the cause, proceeded as follows:—With regard to the account, this is a case most unquestionably of cross demands; and, although the plaintiff sues as a pauper,

(a) 6 Ves. 136. As to the action of account generally, see *Baxter v. Hosier*, 5 New Ca. 288; 2 Scott. 129.

(b) 1 Sch. & L. 305.

and the defendant professes—and, I dare say, sincerely professes—an intention never to sue the plaintiff, yet, whether the plaintiff's circumstances do or do not, as it is possible they may, change, the defendant may at any time alter his present intention, and sue the plaintiff. Of these cross demands there is a plurality on both sides. Unquestionably also on one side, whether tenable or not tenable, they are numerous. Whether all the subjects of claim on either side could be included in any one action, is at least doubtful. My present impression is, that, unless possibly in the almost obsolete action of account, the probability is, that they could not be on either side included in one action. I am also disposed very much to doubt whether all the demands on either side could be made the subject of set-off; but, however these points may be, and assuming, for the sake of argument, that the demands on either side could all be included in one action, not merely of account, and that the counter-claims on the other side could be made the subject of set-off, still the action so constituted would be one which, in my judgment, could not with convenience and efficiency be thoroughly tried at *Nisi Prius*; and that the probable consequence of an action, in whatever form, between these parties, involving the various matters of dispute between them, would be a reference at *Nisi Prius* as soon as the case had been opened.

Now, without saying whether the complication in this case is equal to the complication that appears to have existed in the case before Lord *Redesdale*, I mean the case of *O'Connor v. Spaight*, I have no doubt that this is a case *which [*628] may be justly described as having some degree of complication in it. Then, taking Lord *Redesdale* to state the law accurately, as he generally did, what do we find him say?—"The ground on which I think that this is a proper case for equity, is, that the account has become so complicated that a Court of law would be incompetent to examine it upon a trial at *Nisi Prius* with all necessary accuracy, and it could only appear from the result of the account that the rent was not due. This is a principle on which Courts of equity constantly act, by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account, that it cannot pro-

 1843.—*Kennington v. Houghton.*

perly be taken at law, and until the result of the account, the justice of the case cannot appear. Matter of account may, indeed, be made the subject of an action, but an account of this sort is not a proper subject for this mode of proceeding: the old mode of proceeding upon the writ of account shows it; the only judgment was that the party 'should account,' and then the account was taken by the auditor; the Court never went into it."—An observation, perhaps, that has not always been sufficiently attended to by those who have complained of references to Masters, or of the course taken at *Nisi Prius* in referring an action involving disputed accounts, the truth being, as I conceive, that the course is, as near as circumstances will permit, that which the old form of proceeding was, under the action of account to which Lord *Redesdale* refers.

Upon the whole of the case, considering the very special nature of the lease, the very special provisions which it contains, and the various other matters of demand and account between these parties, I think, that, as this is a case in which a Court of equity has the jurisdiction to decree an account, so it is a case in which that jurisdiction ought to be exercised. Besides, it is to be considered that we are now at the hearing of the cause, after the cause has been in Court for a period of very [*629] nearly four years; that *there never has been any demurrer, total or partial; and in looking into the pleadings to see whether an objection was taken to the jurisdiction analogous to a demurrer, I have been able to find none; but, on the contrary, I do find that which, without any great stretch of construction, may be taken to be a submission to account in this Court, if the Court should think it a fit case in which to decree an account. For these reasons, I think there should be an account.

It is a remarkable circumstance, that this lease contains a provision for its determination, if any execution should issue against the tenant upon which the lease should be liable to be taken; and contemporaneously with the lease, a warrant of attorney is given to the landlord by the tenant, which enables the landlord to issue execution at any time, and so to determine the lease; and this in a case where there must be considerable expenditure on the part of the tenant, in which he is necessarily en-

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gaged in a species of speculation on the farm. Nor is this the only provision in this lease from which I gather that the interests of the landlord were closely and carefully attended to upon the occasion. Many acts on the one side and on the other were to be done within the first two years of the term, including expenditure on each side, as I read the lease, to a considerable extent. The lease is executed in January, 1840, the term is for twenty-one years, reducible only at the option of the landlord to fourteen. The first two, which was the time limited for the completion of this expenditure, would expire at Michaelmas, 1841. In the summer of 1841, steps are taken to eject the tenant, after all the stock and effects on the farm have been taken. All this may have been very proper. I give no opinion upon it. The landlord is entitled to exercise such a right as his contract with the tenant and the law of the country give him. But coupling with these facts all the circumstances of conduct on each side, I am led to the conclusion, *that the Court [*630] does not know the whole of this part of the case. On the whole, there is so much complexity belonging to this transaction, that I think it right to add to the account an inquiry under what circumstances the assignment by the sheriff, and the valuation of the property included in the assignment were made.

REFER it to the Master to take an account of all the just claims of either party against the other, under or by virtue of the indenture of lease, and of all the other dealings and transactions between the parties, and to state the balance; and in taking the account, the Master is not to charge the plaintiff with any rent subsequent to the execution by the sheriff of the assignment, and is not to charge either party with any breach of covenant subsequent to the execution by the sheriff of the assignment, and he is to make to each party all just allowances. Inquire under what circumstances the assignment by the sheriff, and the valuation of the property included in the assignment, took place. The Master to be at liberty to state any special circumstances with respect to any of the matters. By the plaintiff's consent, let the defendant be at liberty to cross-examine, *visa voce*, before the Master, such of the witnesses already examined on the part of the plaintiff in the cause as the defendant may desire so to cross-examine; the defendant undertaking to produce the witnesses himself for his own cross-examination, and the plaintiff being at liberty to re-examine *visa voce* the witnesses whom the defendant shall so elect to cross-examine. Let the plaintiff give the usual undertaking to account. And the plaintiff submitting by his bill to pay to the defendant what, if anything, shall be found due on taking the account prayed by

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the bill, reserve the consideration of what shall be done upon that submission,^(a) and reserve further directions and costs.

[*631]

*HALL v. LACK.

1843 : November 25th.

Where it appeared that the association of a cestui que trust and trustee, as co-plaintiffs on the record, might materially injure the interests of the former, the Court gave leave to amend the record by striking out the name of the trustee as plaintiff, and making him a defendant.

IN 1840, the defendant, John Lack, being the holder of a pension of £1000 a year, as a superannuated officer of the Customs, entered into a treaty with the plaintiff Hall, through the medium of his co-plaintiff Phillott, for the sale of the pension to Hall. The purchase did not take place, but by an indenture, duly executed between the defendant Lack of one part, and the plaintiffs of the other part, the defendant, in consideration of certain promissory notes, to the amount of £5000, therein mentioned, (which the bill alleged to have been afterwards duly paid,) granted to the plaintiff Hall an annuity of £804 15s., and assigned his pension to the plaintiffs, upon trust for securing the punctual payment of the annuity. Previously to the execution of the deed, the defendant Lack executed a power of attorney to the plaintiffs to receive the pension. That instrument, however, was never delivered to the plaintiffs, but remained in the office of the Receiver-General of the Customs.

The annuity not having been regularly paid pursuant to the indenture, the present bill was filed against Lack and others for the purpose of making it effectual against the pension.

The defendant Lack, by his answer, stated, that, in 1839, being in want of money, he employed the plaintiff Phillott, and a person who was then the co-partner of Phillott, to raise money for him, which they did upon exorbitant terms, and without

(a) The submission to account was not reserved, being a necessary part of every such decree.

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coming to any account with him : that he, the defendant, never received any consideration for the annuity mentioned in the bill, except the re-purchase of two former annuities, at the respective prices of £1100 and £1200, and that if any further sum was advanced by the plaintiff Hall, as the consideration for his annuity, of which the defendant was ignorant, the same must have been advanced by him to Phillott and his partner, and Phillott was therefore liable to account to him for the sum so advanced.

*In consequence of this answer, a motion was now [*632] made, on behalf of the plaintiffs, that they might be at liberty to amend the bill by striking out the name of the plaintiff Phillott, and making him a defendant ; and otherwise to amend the bill as they might be advised, upon the plaintiff's giving security to the defendants for their costs already incurred in this cause, to be approved of by the Master, and paying to the defendants their costs of this application, to be taxed by the taxing Master.

The plaintiff Hall by his affidavit, stated, that the several sums, amounting to £5000, mentioned in the bill, were actually advanced by him to Phillott, to be applied to the defendant's use, and he believed that they had been so applied. Phillott also stated, by his affidavit, that they had been so received and applied. Both deponents swore, that they did not, previously to the filing of the bill, suspect or believe that the consideration for the annuity would be disputed. And the plaintiff Hall stated that he was advised and believed, that, in case Phillott were not a plaintiff, he should be entitled to resist the taking such account, as suggested by the defendant, and that it was necessary to enable him to bring his case fairly before the Court, that Phillott should be made a defendant, and that other amendments should be made in the bill, to meet the case made by the defendant.

Mr. *Heathfield*, for the motion, said, that, unless this application were granted, the ends of justice might be defeated. The principles on which motions of this description were founded

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were laid down by Lord *Cottenham* in the case of *Attorney-General v. Cooper*.(a)

Mr. *Rolt*, *contra*, contended that, according to the bill,
[*633] *as well as the answer, Phillott acted throughout as the agent of Hall, and not merely as trustee.

THE VICE-CHANCELLOR.—If the defendant has any rights against Hall by reason of the agency or conduct of Phillott, those rights may be enforced in this suit, whatever may be done upon this motion. In that respect, the presence or absence of Phillott as a plaintiff on the record makes no difference. Phillott was agent, and became trustee. His agency appears in the bill as mere matter of narrative. As agent, he is a superfluous and unnecessary plaintiff. He happens also to be a trustee. In that character he is a co-plaintiff with Hall, whose suit alone this substantially is. Whether the supposition be well or ill founded, it appears that the rights of Hall may sustain damage by reason of the mere act of association with Phillott on the record. That ought not to be. If, independently of that observation, any prejudice should arise to the rights of the defendant, in consequence of this application being granted, that defence will be fully open to him.

ORDER according to the notice of motion, unless the defendant waive the security for costs; the plaintiff Hall undertaking to amend, and Phillott undertaking to appear and answer within a given time. The present defendants to have six weeks' time to answer the amended bill. Reserve the consideration of all other costs incurred, or to be incurred, in consequence of this application or of the amendment.

(a) 3 Myl. & Cr. 258. See *Motteux v. Macreth*, 1 Ves. jun., 142; *Lloyd v. Makeam*, 6 Ves. 145; *Tappan v. Norman*, 11 Ves. 563; *Read v. Treacher*, 2 Keen, 317.

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***ATTORNEY-GENERAL V. HIGHAM.**

[*634]

1843: December 12th.

Testator bequeathed £500 to his executors, upon trust that they should lay out and invest the same in the public funds, or in such other security, or in such other manner as to them should seem expedient, at interest, and pay and apply the produce to a charitable purpose. One of the executors, who took the entire management of the estate, paid the debts, and most of the legacies of the testator, but neither specifically appropriated nor invested £500 for the charity. He paid interest, however, on £500 to the charity; at the same time receiving interest on the promissory note of a debtor to the estate who was in good credit, but whose debt was the only fund available for payment of the legacy. The executor afterwards died. On the admission, by his representatives, that he had, in his lifetime, assented to the payment of the legacy to himself, as trustee.—*Held*, that his estate was severally answerable, as for a breach of trust.

Evidence of admission of assets by payment of interest on a legacy.[1]

Deed set out in a defendant's answer made evidence for the plaintiff generally.

In the year 1801, Henry Duxbury, being seised in fee of a small estate, called Woodcock Hill, out of which he paid £19 a year to the master of a school at Ribchester, under the trusts of a certain will, conveyed the premises, subject to such annuity, to Richard Higham in fee. Richard Higham for some time paid the annuity, but afterwards, in 1805, ceased to do so, on the ground that such payment was void under the Mortmain Act.

Richard Higham, by his will, dated the 8th November, 1817, after giving various pecuniary legacies, gave and bequeathed to his son Joseph Higham, his daughter Emma Mercer, and his grandson Joseph, son of his late son John, (whom he made executors and executrix of his will,) their executors, administrators, and assigns, the sum of £500 of lawful English money, out of such part of his personal estate as was not, or might not, be secured by mortgage or other charge upon realty, upon trust, that they, the same trustees or trustee for the time being, should lay out and invest the same principal sum of £500 in the public funds, or in such other security or in such other manner as to them should seem expedient, at interest. And upon further

[1] See note, ante, page 321.

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trust, that they, the same trustees for the time being, should pay and apply the yearly sum of £5 (part of the dividends, interest, and produce to arise from said stocks, funds, or investment) unto Henry Duxbury, during his life; and should, either annually or otherwise, according to the discretion of them his same trustees for the time being, pay and apply the whole of the aforesaid dividends, or other produce of such stocks, funds, or [*635] other investment *or investments, subject to the said yearly sum of £5, to charitable uses or purposes for the benefit or advantage of such poor persons residing in all or any of the three townships of Ribchester, Hothersall, and Dutton, in the county of Lancaster, as his said trustees or trustee for the time being should think proper; and the same charity to be administered in alms, education of children, or in such other manner, and for such other charitable purposes, within all or some of the said townships, as his said trustees or trustee for the time being should think expedient and proper; and he recommended his said trustees or trustee for the time being to consider and ascertain the probability of establishing a school for educating the poor children resident in the said three last-mentioned townships according to the Madras system, as it was his opinion, that the said three townships would derive more permanent advantage from the said legacy or sum of £500 if the same were applied to the furtherance of that object, than if it were applied in any other manner. Then followed a clause for the appointment of new trustees. And the testator bequeathed all his residuary personal estate, after payment of the said trust sum of £500 and the various legacies thereinbefore mentioned, to the said Joseph Higham his son, Emma Mercer, and Joseph Higham his grandson, on certain trusts as to one half thereof, for the benefit of the said Joseph Higham his son, and as to the other half thereof, for the benefit of the children of James Higham, a deceased son, payable at their respective ages of twenty-five years.

The testator died in January, 1818, and in the following August his will was proved by Joseph Higham his son and Emma Mercer, power being reserved to Joseph Higham the grandson, who was then an infant, to prove the will. Joseph Higham the son took upon himself the active execution of the

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will, and paid all the testator's debts, and, with the exception of the charity legacy, all the legacies, *including [*636] a legacy to himself of £2120, and a legacy to Emma Mercer of £1700. No fund was set apart by him for the payment of the charity legacy, but, on the contrary, a considerable part of the assets of the testator were left outstanding; in particular, a promissory note for £1100, due from one Richard Ward to the testator, in respect of which only interest and principal to the amount of £500 were received by the acting executor. Interest, however, on the charity legacy, at the rate of 4*l.* 10*s.* *per cent. per annum*, was paid to the schoolmaster, John Gregson, by Joseph Higham the son, until his death, which took place in June, 1822. His executors then continued the payment until other arrangements were made for that purpose, as after mentioned.

On the 5th January, 1824, a meeting was held for the purpose of considering the affairs of the testator, Richard Higham. The meeting was attended by the executors of Joseph Higham the son, Emma Mercer, and Joseph Higham the grandson, when the accounts kept of the testator's estate by Joseph Higham the son were produced by his executors to the other parties, and were examined and audited, and the note of Richard Ward, together with other securities of the testator, was delivered to Joseph Higham the grandson. And by a deed-poll, bearing date the same 5th January, and executed by Joseph Higham the grandson, and Emma Mercer, after reciting the will of Richard Higham, and that, after his decease, it had been proved by all his executors, and reciting the death of Richard Higham, and that Joseph Higham the son had in his lifetime, with the approbation of his co-executors, taken upon himself the chief management and execution of the trusts of the said will, and that he had then lately departed this life, having by will appointed Alice Higham, Christopher Hindle, and William Eccles, his executors; and reciting, that the said executors had produced to the said Emma Mercer and Joseph Higham the *grandson, all the accounts, papers, vouchers, evidences, [*637] and documents in their custody, touching the execution of the will of said Richard Higham by said Joseph Higham the

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son, and that those accounts had been duly investigated and examined by the said Emma Mercer, and Joseph Higham the grandson, and had been finally approved of and possessed by them; and that the balance found due from the executors of the said Joseph Higham the son, upon the same accounts, had been duly paid, it was witnessed that they, the said Emma Mercer and Joseph Higham the grandson, (so far as they could, but not so as to charge themselves with the accounts of said Joseph Higham the son,) released, exonerated, and discharged the said Alice Higham, Christopher Hindle, and William Eccles, their heirs, executors, and administrators, and every of them, and all the estate and effects of the said Joseph Higham the son, of and from all actions and suits, causes of action and suit, accounts, transactions, claims, and demands whatsoever, which against the said Alice Higham, Christopher Hindle, and William Eccles, they, the said Emma Mercer and Joseph Higham the grandson, then had, or could, or might at any time thereafter have, claim or demand on account of the said will of Richard Higham, or any thing therein contained, antecedent to the day of the date of that indenture.

After the execution of this deed, the executors of Joseph Higham the son took no farther management of Richard Higham's estate, except that the following arrangement, relating to the payment of the schoolmaster, which had commenced in 1823, was continued till about the year 1826. The arrangement, which had been entered into with the consent and by the orders of Emma Mercer and Joseph Higham the grandson, was, that Alice Higham, the widow and executrix of Joseph Higham the son, should supply the schoolmaster with groceries and shop goods to the extent of the interest of the legacy or trust fund of £500.

[*638] *This mode of payment being discontinued in January 1826, applications were made to Joseph Higham the grandson to pay the schoolmaster's salary. He at first refused so to do, but afterwards yielded to the application, and paid £20 *per annum* to the schoolmaster, John Gregson, from the year 1826, to the year 1836, when Gregson died.

No farther payment having been made after the death of Greg-

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son, an information and bill was filed (in which the present schoolmaster was plaintiff) against Joseph Higham the grandson, Emma Mercer, and the surviving executor of Joseph Higham the son, praying that the trust sum of £500, with all arrears of interest, might be paid into Court by the defendants, or some of them, and might be invested for the benefit of the charity; that new trustees might be appointed, and that, if necessary, all proper accounts might be taken of the estate of Joseph Higham the son.

The information and bill charged, that Robert Ward was for many years in good circumstances, and that his promissory note might have been enforced, but that £500 only had been received upon it; that although Joseph Higham the grandson did not prove the will of Richard Higham, until the year 1842, yet he was responsible for what ought to have been done since the death of Richard Higham; that the defendants, or some of them, had received and had admitted the receipt of assets of the testator, Richard Higham, for the payment of all the legacies in full; that they had, in the hands of all and each of them, assets of the said testator for payment of the £500, and ought to have paid and invested the same; that, in particular, Emma Mercer and Joseph Higham had, with the consent of Joseph Higham the grandson, paid their own legacies in full, and that after Richard Higham's death, Joseph Higham the grandson had divided the residuary estate upon the trusts of the will, and that he and Emma Mercer had paid one-half of the residuary estate to the executors of Joseph Higham the son; that the executors of Rich- [*639] ard Higham assented to the said bequest of £500 to them as such trustees as aforesaid: and that the survivors of them, as such trustees, and the executors of Joseph Higham the son, as deceased trustee, ought to be declared severally responsible as for a breach of trust in not investing the same, and ought severally to be decreed to pay the same; and that the executors of Joseph the son had received assets of the deceased trustee Joseph Higham, come to their hands for the purpose of the aforesaid payment.

The defendant Joseph Higham the grandson, by his answer,

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stated, that, until 1842, every thing which he had done in relation of the estate of Richard Higham (including the receipt of Ward's note) was done as agent for the defendant Emma Mercer, whose son-in-law he was, and he submitted that his payment of £20 a-year for the schoolmaster (for which payment he stated that he had been reimbursed by the children of James Higham out of certain rents of which he was a trustee for them) did not amount to an admission of assets for the payment of the £500. He denied any other receipt of assets, or that he ever acted as executor till he proved the testator's will in 1842; and, although the bill alleged, that, on the occasion of the meeting in January, 1842, a balance had been paid over by the executors of Joseph Higham to himself and Emma Mercer, he denied that such was in fact the case, as the accounts which were then made up proceeded on the supposition that Ward's note was valid and available. He stated that Ward's note was drawn upon an improper stamp, and that, although Ward for some years after the year 1824 carried on business, he was in insolvent circumstances, and that it would have been useless to have sued him upon the note.

The defendant Emma Mercer, by her answer, corroborated the statements of the last-named defendant, except that she stated her inability to give a reason why Ward had not been sued on his promissory note.

[*640] *The defendants, the executors of Joseph Higham the son, by their answer, alleged that their testator had been most diligent in getting in the property of Richard Higham; that, during their testator's lifetime, Ward was a person in good circumstances, and they submitted that it was competent to their testator to allow the £500 to remain a short time outstanding on the same security on which Richard Higham had left it. They admitted, however, that no appropriation had been made of the £500, because all Richard Higham's estate could not be got in in their testator's lifetime. They admitted the charge in the information and bill, that their testator had assented to the bequest of the £500 to himself as trustee; but they submitted that he had been guilty of no breach of trust, for it did not appear that he could have got in the whole £1100; that, at his

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death, his character as trustee ceased, and did not devolve to them, the defendants; and that whatever was owing from him at his death to the estate of Richard Higham was a mere simple contract debt, and as such, was capable of being barred by the Statute of Limitations, and they claimed the benefit of the statute as if they had pleaded the same in bar of the information and bill. They denied assets of their testator for payment of the legacy.

The cause now came on for hearing.

Mr. *Wigram* and Mr. *Hull*, for the plaintiff.

Mr. *Russell* and Mr. *Piggott*, for the defendants, Joseph Higham and Emma Mercer.

Mr. *Swanston* and Mr. *Shadwell*, for the defendants, the executors of Joseph Higham the son.

In support of the case against the defendants Joseph Higham the son and Mrs. Mercer, certain letters were read which were addressed by Higham, with the consent of Mrs. Mercer, to the incumbent of Ribchester, in the months *of Octo- [*641] ber, 1836, and February, 1837. They were written in reference to the appointment of the new Master, and contained the following paragraphs:—

The mastership of the school at Ribchester being now vacant, I think it a good opportunity of attempting to improve the system of education in the village. We have no power over the present school, or its master, nor do I know how or by whom he is appointed, or what emoluments are attached. It is evident that £20 a year will not attract a master of any ability. * * We do not intend to make any appropriation at present, or without your knowledge. The money may be dispensed either in clothing or education, but education must be more desirable. * * * I beg to state that Messrs. Mercer and myself have no objections to concur in the appointment made of a school master; I know Mr. Bond, &c. * * * I purpose being over towards the latter end of April, and will make arrange-

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ments for the payment of last half-year, and also for the payment of the future half-years, to the master, on his producing a certificate &c.

After these letters were read, the plaintiff's counsel, with a view to show that the defendant Joseph Higham had, as alleged by the will, taken upon himself the executorship in January, 1824, proceeded to read, as against him, the release mentioned, *ante*, p. 636. That release had been set out in the answer of the executors of Joseph Higham the son, and had been proved in the cause by the plaintiff under an order for that purpose.

It was objected by Mr. *Russell* that the point was not in issue on the pleadings, whether or not the defendant was made liable by releasing his executor. [*The Vice Chancellor*.—The plaintiff seeks to prove an admission of assets.]

THE VICE-CHANCELLOR.—The allegation in the bill is, [*642] that one of several persons appointed executors, *who proved the will, but not till long after the others, has done acts which amount to an admission of assets. Of the acts contended to have had this effect, the weight and value must or may depend principally on this question—when did Joseph Higham first agree to take upon himself the character of executor? This deed is produced for the purpose of showing when he first took upon himself that character. The question of admission of assets is distinctly in issue.

The cause then proceeded on the merits.

For the plaintiff—The defendant Higham has been for years holding out that he had the patronage of the mastership of this school. He has also for ten years paid interest on this legacy. Can he now be allowed to avoid the consequences of such acts? He says, indeed, that the parties entitled to the rents of the real estate reimbursed him; but he never intimated to them that it was unsafe to make those payments: they have been relying on his acts, and he cannot now throw the *onus* upon them. Taking into consideration the release, the letters, and the pay-

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ment of interest, he must be considered as having admitted assets for the payment of this legacy. The defendant Mercer has clearly received assets. She does not even profess to say why the whole of the money due on Ward's note was not enforced. As to the executors of Joseph Higham the son, they admit that their testator assented to the bequest of the £500 legacy to him as trustee. As to the payment of interest on a legacy being a sufficient admission of assets, *The Corporation of Clergymen's Sons v. Swainson*,^(a) *Hoarsley v. Chaloner*,^(b) *Attorney-General v. Chapman*,^(c) *Whittle v. Henning*,^(d) and *Barnard v. Pumfrett*,^(e) are in point

*For the defendants Joseph Higham the grandson and [°643] Emma Mercer—The bill does not seek to charge the defendants as having personally undertaken to pay this legacy in consideration of benefits received under the will, but on the ground of having received assets. The defendant Joseph, however, has received no personalty, and the legacy to the other defendant was paid by the transfer of a mortgage. The whole of the personal estate applicable to the payment of this legacy was retained by Joseph Higham the son, and after his death by his representatives, who have refused to pay over any part. Neither of these defendants have any claim upon the residue. The charge, therefore, of having received assets for the purpose of this legacy wholly fails. It may be conceded that, *in law*, Joseph Higham the grandson accepted the executorship in 1824; but that is immaterial, if his subsequent acts did not amount to an admission of assets; and it cannot be said that his release of his co-executor, or the payment of the £20 *per annum*, in the manner in which it took place, amounted to such admission.

For the defendants, the executors of Joseph Higham the son—The personal representatives of the deceased trustee, admitting that Joseph Higham the son was a trustee, did not become trustees. It has been established that, as between the parties themselves, the agreement was, that the surviving executors should

(a) 1 Vez. sen. 75.

(b) 2 Vez. sen. 83.

(c) 3 Beav. 255.

(d) 2 Beav. 396.

(e) 5 Myl. & Cr. 63.

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be trustees of the sum in question. Then, is the charity bound by that agreement? It is not a case of excluding the trustees of a charity from their rights. They have had the benefit of the legacy from the surviving representatives of the testator. They make no demand against the representatives of the deceased trustee. There is recognized a liability in the surviving executors, and an exemption from liability in respect of the deceased trustee. Acts are done manifesting that this was the state of things. [*The Vice-Chancellor*.—Was there [*644] "not a personal liability to this charity on the part of old Joseph Higham at the time of his death?"] Assuming that he was a trustee, (though the mere admission by these defendants that he assented to a conclusion of law will hardly raise that inference,) he committed no breach of trust. The proper fund for the payment of the legacy, which was Ward's note, was perfectly safe in his lifetime, and he was justified in leaving it on that security: *Buxton v. Buxton*.(a) The fund was lost by the surviving executors, who might, equally with the deceased executor, have sued Ward for the remaining £600. They have released his estate. Besides, under all the circumstances of this case, the Court will regard the lapse of time. [*The Vice-Chancellor* referred to *Attorney-General v. Hungerford*,(b) upon the question whether a charity is barred by lapse of time.] Whether the statute can or cannot properly be pleaded in bar, yet lapse of time is an impediment which the Court will regard; and this is not a case of *devastavit*, like that of *Knatchbull v. Fearnhead*,(c) but one in which the deceased will be treated as a simple contract debtor only: *Llewellyn v. Mackworth*,(d) *Cox v. Bateman*,(e) *Webster v. Webster*,(f) *Portlock v. Gardner*.(g)

THE VICE-CHANCELLOR.—It has not been contended for the trustees of the will of Richard Higham that they were authorized to invest the sum of £500 upon a security merely personal. On that point, however, it is not necessary for me to give any

(a) 1 Myl. & Cr. 80.

(b) 8 Bligh, N. S., 437; 2 Cl. & Fin. 357.

(c) 3 Myl. & Cr. 122.

(d) Vin. Abr. Limitation (T.)

(e) 2 Vez. sen. 19.

(f) 10 Ves. 93.

(g) 1 Hare, 594.

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opinion, because, if the will did authorize an investment on personal security, there is no evidence to satisfy me, that either by appropriation or otherwise that was duly done.

The testator who gave this charitable legacy died in *January, 1818. His will was proved by two of the [*645] executors, Joseph Higham the elder and Emma Mercer, in August in the same year. Joseph Higham the executor lived to June, 1822, more than three years after the probate, and more than four years after the death of the testator. During that period, if he was not the sole, he was the principal, acting executor of the deceased. It appears that he dealt with the assets and paid himself a legacy of large amount, which possibly he had a right to receive, consistently with the non-payment of the charity legacy. The answer, however, of his executors admits that he did, in his lifetime, assent to the payment of the charity legacy to himself as trustee, and it is all but admitted at the bar that this was equivalent to an admission of assets. Independently of that, it is admitted that he paid interest upon the legacy to the charity, and that, if a breach of trust was committed by him, it was committed against the charity. It is alleged, on the part of those who represent the estate of Joseph Higham, that, although interest was paid upon it, the only means of paying the charity legacy was the promissory note of Ward, who was then in good credit, and paid interest while Joseph Higham, the deceased executor, was alive. When I look at the trusts and consider what was the only fund upon which the charity had to rely, although the charity required a permanent investment,—when I consider that Joseph Higham lived and acted as executor of his testator more than four years after that testator's death and three years after the probate of his will, receiving all that time interest from his debtor, Mr. Ward, and paying interest on the legacy to the charity,—I am bound to come to the conclusion, that he acted in a manner not authorized by the will, that he committed a breach of trust, and that his estate was to that extent indebted to the charity at the time of his death.

DECLARE that Joseph Higham, deceased, was, at his death, severally
*liable personally for the payment of the sum of £500 given to the charity, [*646]
without prejudice to the question whether, at the time of his death, the de-

1843.—Attorney-General v. Higham.

defendants Joseph Higham and Emma Mercer, were or were not personally liable for the same at that time. Reserve that question, and also the question whether they are not now personally liable for the payment of the legacy of £500, and interest due upon it. And, by consent of the defendants Joseph Higham and Emma Mercer, let them pay into Court the sum of £600, on or before the 23rd January; the sum of £500 to be laid out by itself, and the sum of £100 to be laid out by itself; and let the dividends to accrue due on the investment of the £500 be paid to the plaintiff J. H. Boud, as schoolmaster, till further order; such payment to be without prejudice to any question in the cause. Take an account of what is due for interest on the legacy of £500, without prejudice to any question from whom it is due. At the request of all the defendants, take an account of the personal estate of Richard Higham received by the defendants, or any of them, or by any person or persons by their or either of their order, or for their or either of their use, and of its application. Inquire and state, whether there is any, and if any, what part of the personal estate of Richard Higham outstanding; and whether the debt due from Richard Ward to the estate of Richard Higham, or any and what part, has been lost or is irrecoverable; and if so, under what circumstances. At the like request, direct the ordinary administration accounts in full (in a creditor's suit) against the estate of Joseph Higham, deceased. Liberty to state special circumstances as to Ward's debt, or as to any other matter. Reserve further directions and costs.

THE VICE-CHANCELLOR, after pronouncing these minutes, observed, that his present impression was, and counsel were at liberty to take a note of it, that the defendants Joseph Higham and Emma Mercer were personally liable for the legacy.

[*647]

*MANSON V. BURTON.

1843: December 5th.

Form of order for the re-examination, after decree, of witnesses who have been examined in chief.

Mr. ROGERS moved that the plaintiffs may be at liberty to examine A. B., C. D. &c., or any of them, as witnesses, *viva voce*, either before the Master, to whom this cause stands referred, or before the examiner or commissioners to examine witnesses in this cause on the matters of the accounts and inquiries directed by the decree, notwithstanding they have been examined in chief; such examination being confined to the proof of exhibits

1843.—Manson v. Burton.

not entered in the said decree or decretal order dated &c., or matters not already deposed to by the witnesses respectively.

No special case was made in support of this motion, but notice was served on the defendants.

The registrar (a gentleman not usually attending this Court) expressing some doubt whether an order drawn up in the terms of the notice of motion would be regular—

THE VICE-CHANCELLOR said that the form of the order in the terms above mentioned had, as he conceived, been long in use.

PHILLIPS V. EVANS.

1843: December 5th.

Mortgage deed in the hands of the mortgagee, ordered, on the application of the mortgagor, to be produced for the purpose of inspecting an indorsement on the instrument.

DAVID JONES being seised in fee of an undivided moiety of a freehold estate situate in the county of Cardigan by an indenture dated the 10th February, 1819, mortgaged the same for £400*l.* to David Evans, for a term of years. David Jones afterwards took the benefit of the Insolvent Debtors' Act, and by an indenture dated in June, 1823, his effects were assigned to the provisional assignee of the Insolvent Debtors' Court.

The rents of the whole *property were received by [*648] David Jones the younger, and he paid interest on the £400 to the mortgagee during his lifetime. After the mortgagee's death, which took place in November, 1825, the same person continued to pay the interest to his executors until the year 1837, when they took possession of the mortgaged premises.

The bill was filed by the creditors' assignee of the insolvent mortgagor against the executors of the mortgagee, who were also devisees of his estates, paying the usual accounts against mortgagees in possession, and for redemption.

1843.—*Phillips v. Evans*.

The bill charged that the defendants pretended to be entitled to a further charge on the property to the extent of £300, which they claimed to tack to their original debt; but that, in fact, such further charge was created subsequently to June, 1823, and when the mortgagee had full notice of the insolvency of the mortgagor, and that such notice would appear from recitals in the writing of further charge and from the date thereof, and from indorsements made on the original indenture, and otherwise from the production of the said indenture. The bill also contained the usual charge as to the possession of deeds, papers, and documents.

The defendants by their answer stated their belief that Jones the mortgagor failed to pay the principal sum of £400 to Evans on the day of payment mentioned in the mortgage-deed, and that, some time after the date and execution of that indenture, he applied to Evans for a further advance of £300 on the security of the mortgaged premises; that accordingly Evans advanced that further sum, and that, to secure the re-payment of it, Jones gave him a memorandum in writing which was indorsed on the indenture of mortgage, and which was to the following effect, that is to say, "I the within-named David Jones do hereby acknowledge to have received of and from the within-named David Evans the further sum of £300 on the further credit and security of the premises within mentioned. Witness my hand the 4th day of September, 1823."

The defendants neither admitted nor denied the charge of notice against the mortgagee contained in the bill, but stated their ignorance as to that alleged fact.

Mr. *Romilly* and Mr. *John Adams*, for the plaintiff, now moved for the production of the mortgage deed.—The inference to be drawn from the charge in the bill, is, that the memorandum of further charge, so far as its date is concerned, is a forgery. The plaintiff therefore, seeking to set aside the instrument on the ground of fraud apparent on the instrument itself, is entitled to its production, although it be a security in the hands of a mortgagee: *Kennedy v. Green*,^(a) *Fencott v. Clarke*,^(b) *Ex parte*

(a) 6 Sim. 6.

(b) *Id.* 8.

1843.—*Phillips v. Evans.*

Caldecott,(a) Pilkington v. Himsworth,(b) Neate v. Latimer.(c) The judgment of Lord Abinger in the last-mentioned case is expressly in point. The plaintiff is also entitled to the production of the instrument, on the ground of pleading. The defendants, by their answer, do not simply refer to the mortgage deed, as in *Hardman v. Ellames,(d)* but they profess to set out the document, as in *Latimer v. Neate,(e)* and, according to the judgment of the House of Lords in that case, that is a ground for ordering its production.

Mr. *Shadwell, contra.*—There is nothing in the prayer of this bill impeaching the indorsement: the prayer is simply to redeem. Nor do the allegations of the bill directly impeach the indorsement. The charge in the bill is, that it was made after the insolvency of the mortgagor, as would appear from the recitals in the further charge; *but the answer in effect [*650] denies that there are any recitals. At all events, the plaintiffs are not entitled to examine the original mortgage deed.

THE VICE-CHANCELLOR.—This is a bill filed to redeem a mortgage, and it is not disputed that the only question is what amount the plaintiff is to pay, which depends on the contents of the indorsement on the mortgage deed, and the time when the indorsement was executed. The defendant sets out the instrument, which appears to be expressed in the first person, and to be contained in a few lines, which, he says, are the effect of that instrument. Considering the manner in which the document is set out, the nature of the suit, and the circumstances relating to the insolvency of the mortgagor, including the date of the indorsement, I think that this is a case in which the plaintiff should see the indorsement.

Let the indorsement (*and other documents*) be inspected at the office of the defendant's solicitor, and let them be produced before the examiner or commissioner, and let them be in Court at the hearing of the cause; and let the motion in all other respects stand over with liberty to apply; the motion not to be prejudiced by any future amendment to the bill.

(a) Mont. 55. (b) 1 You. & C. 617. (c) 2 You. & C. 257 (d) 2 M. & K. 745. (e) 11 Bligh, N. S., 112; see p. 156. See also Wig. Disc. pl. 437.

1843 — Beales v. Spencer.

[*651]

*BEALES V. SPENCER.

1843: December 13th.

In a suit filed by the assignees of a bankrupt against the trustees of the bankrupt's marriage settlement, and the wife of the bankrupt, for the purpose of recovering the fund subject to the wife's equity, a decree was made at the hearing of the cause, (the husband being absent from the record,) by which it was referred to the Master to approve of a proper settlement for the wife. On the cause coming on for hearing for further directions, the Court declined to proceed in the absence of the husband.

A trust for the wife's own use and benefit is not a trust for her separate use.

By the settlement made previously to a marriage, it was agreed that a sum of £3675 Bank New £4 per Cent. Annuities should be held by the trustees upon trust during the joint lives of the husband and wife, to pay the dividends, interest, and annual produce thereof unto, or otherwise authorize and empower the wife and her assigns to receive and take the same to and for her and their own use and benefit; and in case the wife should survive the husband, upon trust to assign and transfer the stock to the wife for her absolute use; but in case the husband should survive the wife, then to pay the interest and dividends to him or his assigns for his life, and after his decease to hold the capital in trust for such person or persons as the wife should, notwithstanding her coverture, by deed or will appoint, and in default of such appointment, for the children of the marriage, for such interests as therein mentioned, and in default of children taking vested interests under the settlement, in trust for the husband absolutely.

The husband having become bankrupt, the present bill was filed by his assignees against the trustees and the wife, without making the husband a party, for the purpose of recovering the fund, subject to the wife's equity. The wife, by her answer, claimed to receive the interest and dividends during the joint lives of her husband and herself to her separate use. The cause came on for hearing before another branch of the Court, when this claim was decided against her, and it was referred to the Master to inquire what would be a proper sum to allow the wife, and to approve of a settlement.

 1843—Beales v. Spencer.

The cause coming on for hearing for further directions, the *Vice-Chancellor* objected to hear the cause, on the ground that the husband was not a party to the record.

*Mr. *Beales*, for the plaintiffs cited *Duke of Chandos* [*652] v. *Talbot*,^(a) and *Thorold v. Hay*.^(b)

Mr. *Terrell*, for the trustees, and Mr. *Taylor*, for the wife, expressed their consent on the part of those respective parties, and also on the part of the husband, that the cause should proceed, if possible.

THE VICE-CHANCELLOR, after observing that in the *Duke of Chandos v. Talbot* the husband was a party to the record, said, that there were no materials in the suit, as at present constituted, to enable him to make a binding decree on the wife. His Honor, however, suggested that the husband might be brought before the Court by a supplemental bill, filed against him by the wife, by her next friend. If that were done, he would exercise his judgment as to the propriety of the settlement.

MORRISON V. MORRISON.

1843: December 19th.

A testator, by his will, gave the income of shares in a bank to E., a married woman, for life, provided she were a widow at the time of his death, or should become such afterwards, but during her widowhood only; and gave the income during the coverture of E. to P. He also gave P. £800, in case E. should become a widow, in lieu of the income of the shares. By a codicil, the testator revoked the gift of this income, and gave a portion of the income to E. for life, whether she were a widow at the time of his death or not, or should become such afterwards or not. At the time of the testator's death, E. was under coverture:—*Held*, that P. was not entitled to the £800 at the death of the testator, and would become entitled only in the event of E. becoming a widow.

A testator's will contained the following clause:—"I give and bequeath unto my said trustees, their executors, administrators

(a) 2 P. W. 371

(b) 1 Dick. 410.

 1843.—*Morrison v. Morrison*.

and assigns, my shares or stock in the Commercial Bank of Edinburgh, upon trust, to pay a moiety of the interest, dividends, and annual proceeds arising from my said shares or stock, [*653] unto my daughter, Euphemia, for "the term of her natural life, *provided she shall be a widow at the time of my death, or shall become such afterwards*, in which latter case she is to be entitled thereto, for such time only as she shall be and continue a widow; *but in case my daughter Euphemia shall be under coverture, then my will is that the said last-mentioned moiety shall be paid to my son, Peter Morrison, for such part of the natural life of my said daughter Euphemia as she shall be under coverture aforesaid.*" The testator then gave the other moiety of the interest, dividends, and annual proceeds of the shares to another daughter for life, and, subject as aforesaid, gave the shares to his son Peter absolutely. The testator gave the residue of his estate to be divided equally between his sons Peter and William. "*Except, in case my said daughter Euphemia shall become a widow, that my said son, Peter Morrison, shall have out of such residue the sum of £800 more than my son William, in lieu of the half of the dividends arising from my shares in the Commercial Bank of Scotland, to which, in the event aforesaid, he would have become entitled.*"

By a codicil to his will, the testator, after reciting the above bequest of the shares, revoked it, and declared that his trustees should stand possessed of the said shares upon trust to pay one-fourth part of the dividends unto his daughter Euphemia for the term of her natural life, *whether she should be a widow or not at the time of his decease, and also whether she, being then a widow, should continue such or no.* He gave the other three-fourths of the income to his other daughter, and, subject as aforesaid, gave the said shares to his said son Peter absolutely. And he declared that he did thereby ratify and confirm his said will in all respects, except where the same had been altered as aforesaid.

Euphemia, the testator's daughter, was under coverture at the death of the testator.

The suit was instituted for the administration of the [*654] "testator's estate, and one of the questions raised was, whether Peter was immediately entitled to the £800, or

1843.—*Morrison v. Morrison*.

whether his interest in it was contingent on Euphemia's becoming a widow.

Mr. *Lewin*, for the testator's son Peter.—The codicil does not alter the will, except as to the particular part of the will which is recited. The question then is, what is the substantial condition on which the testator meant to give the £800 to Peter? Which is to be considered the main event on which he was to receive that sum—the daughter's becoming a widow, or his loss of the dividends? If the former the consequence may be, that Peter may receive neither the dividends nor the £800; if the latter, the testator's object of providing for Peter is fulfilled. The words "in case my said daughter shall become a widow" are only descriptive of the loss of the dividends in a certain event. They must be read as if included in a parenthesis. Where the general intention of a testator is plain, the Court will rectify the language of the will in order to execute that general intention *Milner v. Milner*,^(a) *Matthews v. Maude*,^(b) *Trevor v. Trevor*,^(c) *Lord Carrington v. Payne*.^(d)

Mr. *Koe*, Mr. *Cooper*, and Mr. *W. Rudall*, appeared for other parties.

THE VICE-CHANCELLOR.—The question which has been very ingeniously argued is, whether I can say that the £800 is to be considered as immediately due, because that in lieu of which it was given, and which it was only contingently to be taken away, is, by other means, taken away. If the circumstances of the case as they now stand had been brought to the testator's mind, he might have provided "for them; but he has not [*655] done so. There is considerable obscurity in the provisions of the will, and I think that I should lose myself in conjecture if I departed from the strict and literal construction of the words. I must hold that the son Peter is not entitled to the £800 immediately, but that he is entitled to a contingent addition

(a) 1 Ves. sen. 106. (b) 1 Russ. & Myl. 397. (c) 5 Russ. 24. (d) 5 Ves. 404.

of £800 to his share of the residue in the event of the daughter becoming a widow.

PERRY v. WALKER.

1843: December 22nd.

The plaintiff sued *in forma pauperis*, and had had counsel and Six Clerk assigned to him. He had also, before and at the time of the decree, and since in the Registrar's and Master's offices, employed a solicitor, who did not appear to have been changed by him or discharged by the Court:—*Held*, that he could not present a petition not having the sanction of such solicitor, or some other officer of the Court.

THE petitioner, who was also the plaintiff in the cause, filed his bill *in forma pauperis*, in the year 1836, and obtained the usual order assigning to him a counsel and Six Clerk. He also, before and at the time of the decree, and since in the Registrar's and Master's offices, employed a solicitor, who did not appear to have been changed by him or discharged by the Court. His present petition however in support of which he appeared in person, had not been signed or presented by a solicitor.

Mr. *Wright*, for the respondent, contended, that the petitioner, having employed a solicitor, and not having obtained any order from the Court to discharge him, could not be allowed to present a petition in person. Any application made by him must be made through, and receive the sanction of, his solicitor or some officer of the court. He referred to the stat. 5 & 6 Vict. c. 103, whereby the office of the Six Clerks was abolished, and to the orders of 26th Oct., 1842, Nos. 3, 16, 18, 19, 21, and 25, which regulate the duties of the new officers of the Court in relation to matters previously transacted by the Six Clerks and sworn clerks; and he contended, that the new regulations had [*656] made no alteration in the practice in this respect. He cited *Rattray v. George*, (a) *Perry v. Walker*. (b)

1843.—Perry v. Walker.

Perry, the petitioner, appeared in person, and contended, first, that the practice had never been such as the respondent's counsel asserted; and, secondly, that, if it ever had been such, it had become obsolete.

THE VICE-CHANCELLOR.—In this case the plaintiff sues *in forma pauperis*—a situation in which the law of the land gives him certain rights and advantages to which he is entitled. These rights and advantages are, however, like all others, accompanied with corresponding duties and disadvantages. Now, as I understand the reason of the rule requiring a notice of motion to be signed at least by a professional agent in the case of a pauper, it is this—that the parties, as to pecuniary liabilities, not being on equal terms, the Court requires that interlocutory applications (which may be made the means of oppression and of useless consumption of the public time) should have, under such circumstances, the sanction of some recognized professional agent responsible to the Court. If I correctly understand the principal, it is applicable to interlocutory proceedings by petition, as well as proceedings on motion. That notice of a motion is required, and not a petition, can, in my opinion, make no difference. In the present case, I have no reason to suppose that the subject of the petition, might not be brought forward by motion. It would be singular, if I could hear it in the form of a petition, and not of a motion. If a distinction is to be made between the two cases, it shall not be made by me. Is the petitioner within the rule? He has had a Six Clerk and counsel assigned to him; he has had the benefit of the orders of the Court; he proceeds under and is now enjoying the benefit of them; and if the new provisions had *not been [*657] made, by which the Six Clerks have been abolished, this petition would, I think, have required the sanction of one of them: so, it cannot be, in my opinion, a just construction of the orders of October, 1842, that a party shall be altogether deprived of his former, without the substitution of some other, protection. If I were to hold that the petition might be heard *in hoc statu*, I should hold that there was not any substituted protection. I apprehend, that there should be some professional

1843.—Perry v. Walker.

sanction to this petition, either that of the Clerk of Records and Writs, or of some solicitor, more especially as the petitioner, at the time of the decree, and since in the Registrar's Office, in the Master's Office, and in the Court, has had the assistance of solicitors, who do not appear to have been changed by him or discharged by the Court. Under all the circumstances, I decline to hear this petition as it stands, unless the Lord Chancellor shall think that it ought to be heard in its present condition.

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ADMISSION OF ASSETS.

1. S. C., by her will, bequeathed a legacy of £150 to S. H., when she should attain twenty-one. The testatrix died in 1811, the legatee did not attain twenty-one till several years afterwards, and she then married. In 1825, (fourteen years after the death of the testatrix,) her executors signed and gave to the husband of the legatee a memorandum in the following words:—"We separately and jointly acknowledge to owe to G. H. the sum of £150, being a legacy left to his wife by the late S. C., and £50 interest thereon."—*Held*, under the circumstances of the case, that this memorandum amounted to an admission of assets by both the executors. *Holland v. Clark*, 319

2. Evidence of admission of assets by payment of interest on a legacy. *Attorney-General Higham*, 634

ADVANCEMENT.

One seized of a copyhold estate for the joint lives of himself and J., and the survivor surrenders it to the lord, and takes a

new grant for the joint lives of himself, J., and W., the surrenderor's son, and the longest liver of them:—*Held*, under the circumstances of the case, that this was intended to be an advancement for W. *Skeats v. Skeats*, 9

ADVOWSON.

By deed, the advowson of the vicarage of C. was vested in nine trustees, upon trust, from time to time, as an avoidance should occur, that they or the major part of them, within the space of four calendar months next after such avoidance, should publish notice in the parish church, upon two several Sundays, immediately after divine service, of a certain time for the meeting of the parishioners within such four calendar months, for electing a vicar; and should, within six calendar months next after such avoidance, by writing under their hands and seals, present to the ordinary for institution and induction, as vicar, such clerk as should be elected by the parties therein mentioned. By the terms of the deed, the election was to be by parishioners having a certain qualification in land in the parish, "or the major part of such parishioners, together with the trustees as aforesaid, or the major part of them then assembling in or at the parish church or market-house of C., within the said four calendar months." On the occasion of an election in 1840 there were eight trustees, two of whom were out of the jurisdiction. Of the remaining six, five signed a written notice of the intended election, which no-

tice was duly published pursuant to the deed, though previous to publication one of the signatures was erased. The same five attended at the meeting, which was held within the proper time, and four of them voted for the successful candidate. These four and the trustee within the jurisdiction, who was not present at the meeting, joined in the presentation, which was subsequently approved of by the trustees out of the jurisdiction. The remaining trustee refused to join in the presentation:—*Held*, that the election was valid; that the dissentient trustee was bound to give effect to it by joining in the presentation, and that the bishop, subject to any question arising as to professional unfitness in the clerk, or corrupt, simoniacal, or scandalous proceedings at the election, was bound to present. *Attorney-General v. Cuming*, 139

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AGREEMENT.

1. Although an agreement between an intended lessor and lessee may possibly amount at law to a present demise or assignment, yet if upon the face of the instrument it appears that a further instrument is necessary to carry the intention of the parties into execution, a Court of Equity will decree specific performance of the agreement in that particular. *Fenner v. Hepburn*, 159

2. Residuary personal estate was given by a will to such of the children of P. as should be living at his death, in equal shares. At the death of the testator there were five children of P., and no more, four of whom being adults, entered into an agreement to the effect that, as amongst themselves, their respective shares, and any share that might accrue to them by the death of their infant sister, should be considered vested in them immediately, notwithstanding P was living. After this, two of the children settled their respective interests in favor of their issue, who were minors. Upon the remaining child, coming of age, she was desirous to join in the arrangement, which the Master found would be beneficial to all parties. The Court, however, declined on the ground of want of jurisdiction, to make a decree for carrying the arrangement into execution. *Peto v. Gardner*, 312

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Testator devised and bequeathed his freehold and leasehold estates to trustees, upon trust to receive the rents and profits thereof when and as the same should become due and payable, and thereout to pay to his wife, if she should survive him, an annuity of £200 during the term of her life, to be paid by four equal quarterly payments, &c.; and from and immediately after the decease of his said wife, upon trust that the trustees should convey and assure the said freehold and leasehold premises unto his (the testator's three sisters, as tenants in common, their heirs, executors, administrators, and assigns. The rents and profits being insufficient for payment of the annuity—*Held*, that the arrears due at the widow's death were chargeable on the corpus of the estates. *Foster v. Smith*, 193

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APPOINTMENT.

A testatrix, after reciting a power of appointment given to her by her deceased father's will over certain personal property, and stating that she computed such property to be of the value of £18,000, or thereabouts, appointed that sum, whether the same should be the whole or parcel only of the amount of such property, to trustees upon certain trusts:—*Held*, that the appointment extended only to the sum of £18,000. *Young v. Martin*, 582

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1. By a decree made in a suit for administering the assets of a testator who died in India, the Master was directed to allow Indian commission to the executor only in respect of assets received by him while resident in India. The testator (whose estate was solvent for the payment of legacies) died possessed of certain notes of the Bengal Government, which the executor took from the Treasury at Calcutta, and handed over to certain trustees, in discharge of a legacy of the testator of equal amount with the notes:—*Held*, that the notes were assets within the meaning of the decree. *Campbell v. Campbell*, 607

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HUSBAND AND WIFE, 1.

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CONDITION.

1. Testatrix devised an estate to the three daughters of L., or such of them as should be living at her decease, and the issue of such as should be dead leaving issue, and their respective heirs, as tenants in common; but upon the express condition that the said daughters, or such of them as should be living at the decease of the testatrix, or their issue, should, within seven years after her decease, personally

appear before her executors, and deliver to them a testimonial of their identity; and in default thereof, the estate was devised over. Upon the death of the testatrix, E. was the party entitled under the devise to the daughters of L. and their issue. E., however, being too aged and infirm to appear before the executors, one of them and the agent of the other attended her at her house, and received from her satisfactory proofs of her identity:—*Held*, that the condition annexed to the devise to the daughters of L. and their issue was performed. *Tanner v. Tebbutt*, 225

2. *Quere*, whether it was or was not a condition subsequent. *Ibid.*

CONDITIONAL LIMITATION.

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CONTRACT.

If two parties, for valuable consideration, enter into a contract of which one of the stipulations is solely for the benefit of a third person, who is a stranger to the contract, and from whom no consideration moves, it is not competent to either of the contracting parties afterwards to object to that stipulation. *Davenport v. Bishop*, 451

COSTS.

1. The costs of a London attorney attending the execution of a commission for the examination of witnesses in the country may, under special circumstances, be allowed on taxation of costs between party and party. *Howell v. Tyler*, 284

2. Under particular circumstances, the Court allowed the commissioner a small fee for perusing the pleadings. *Ibid.*

3. The circumstance that the Court of Bankruptcy has concurrent jurisdiction in the case, is not a necessary ground for refusing costs to a party seeking the assistance of a court of equity. *Meggison v. Foster*, 336

4. The costs of an unsuccessful traverse of an inquisition of lunacy allowed out of

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1. Under an act of Parliament, the real estates of a testator were vested in trustees, upon trust to sell, and, after applying the purchase-moneys received for the respective estates in discharge of the incumbrances affecting them respectively, to pay the surplus monies into the Court of Chancery, there to be applied in payment of the testator's debts in a due course of administration. The various classes, and also the individual names of creditors, were specified in schedules to the act. On a bill filed by the assignee of a specialty creditor, on behalf of himself and all other the creditors of the testator, to have the trusts of the act carried into execution—*Held*, that it was not necessary that all the scheduled creditors should be made parties to the suit. *Batten v. Parfitt*,
343

2. A bill may be maintained by a mortgagee, on behalf of himself and all other the creditors of a deceased mortgagor. *Skey v. Bennett*,
405

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DEBTOR AND CREDITOR.

1. Upon a motion, after decree in a

creditors' suit, to restrain a creditor from suing the administratrix at law—*Held*, under the circumstances, that the creditor was not entitled to the costs, either of the action or of the motion for the injunction, and that the costs of the administratrix should be costs in the cause. *Jones v. Brain*,
170

2. A creditor having *debitum in presenti, solvendum in futuro*, may maintain a creditors' bill. Whether he can obtain a decree for immediate security, must depend on circumstances. *Whitmore v. Osbourn*,
13

3. A person purchased a ship of C., in consideration of three bills of exchange, which he indorsed, and delivered to the vendor. He about the same time wrote an order to his agent W., directing him to pay the amount of one of the bills, £750, to C., out of the freight of the ship. By a subsequent written order, he directed W. to satisfy, out of the freight, the amount of *any current bills* given by him in payment for the vessel. W., after accepting both orders, discounted for C. the £750 bill:—*Held*, upon the construction of the orders, and the circumstances of the case generally, that the second order was not a revocation of the first, and that the lien of W. on the freight, for the amount of the £750 bill, was prior to that of the holders of the other bills. *Mils v. Walton*,
354

4. A creditor having a mortgage on the funds of his debtor for part of his debt does not necessarily surrender that mortgage, or lower its priority, by taking a subsequent mortgage on the same funds for the whole of the debt. *Ibid*.

5. A., a creditor, having a security for his debt upon funds of the debtor, takes afterwards, either alone, but on behalf of himself and B., another creditor of the same debtor, or jointly with B., a security for both debts, on the same funds which were the subject of A.'s separate security; A. does not thereby necessarily relinquish the separate security, or alter its precedence. *Mils v. Walton*.
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DEVISE.

1. Under a devise of testator's messuages, lands, tenements, and real estate—*Held*, that chattel leaseholds of which he was possessed at the time of making his will and of his death did not pass. *Parker v. Merchant*, 279

2. A devise of freehold, copyhold, and leasehold property, apparently general and residuary, held to be specific. *Symons v. James*, 301

3. Testator bequeathed the residue of his personal estate after the decease of his wife, upon trust to pay the interest and proceeds thereof to N. for life; and after his decease, the testator bequeathed the said trust money unto all the children of the said N., in equal shares; and, in case N. should die without leaving lawful issue, the testator gave and bequeathed the said trust-money unto his (the testator's) nieces M. and E., to be equally divided between them, share and share alike: if either of his said nieces should depart this life without issue, then he gave and bequeathed the part or share of her so dying to the survivor of them:—*Held*, that the words "depart this life" meant "depart this life in the lifetime of either of the preceding tenants for life;" consequently, that E., having survived the tenants for life, took an absolute interest in one moiety of the residue, though she died without issue in the lifetime of M. *Desfont v. Bishopp*, 463

4. Under a will, dated in 1827, by which the testator devised all the hereditaments which he should be entitled to at his death to trustees for sale—*Held*, that an estate in which he had at his death a contingent interest in fee, both by way of shifting use and by virtue of an ultimate limitation in default of issue of his brother, did not pass. *Honywood v. Honywood*, 471

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DISCLAIMER.

1. A party, having an interest in the subject-matter of a suit by virtue of a partnership, had parted with his interest prior to the date of filing the bill. The plaintiff, nevertheless, made him a defendant, and he by his answer disclaimed. The plaintiff was ordered to pay such defendant's costs, without being entitled to them over, the Court being of opinion that the plaintiff might have easily ascertained the fact of the assignment, and it not appearing that he had attempted to do so. *Teed v. Carruthers*, 31

2. Although a defendant disclaim all interest in the suit at the bar, and his disclaimer is entered by the registrar, yet the Court will retain him on the record, if there be any question whether he has documents relating to the suit in his possession which ought to be delivered up; and an inquiry will be directed on the subject. *Ibid.*

DISCOVERY.

Surviving executor, who had not acted in the testator's affairs, protected from the discovery of cases and opinions stated and given on behalf of the deceased executor, who had acted; such cases and opinions having relation to a claim against the deceased executor of the same nature as the claim made against the surviving executor. *Adams v. Barry*, 167

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1. Equitable mortgage established by means of written documents, coupled with parol evidence, against a prior voluntary settlement. *Ede v. Knowles*, 172

2. Parol evidence of subsequent advances made on the security of a prior equitable mortgage by deposit of deeds and memorandum in writing not under seal. *Ibid.*

3. *Semble*, that a post-dated cheque is receivable in evidence to prove its own invalidity. *Ibid.*

4. A person gave a bond for £5000 to his sister, but failing to pay the interest due on that bond, gave her another bond to secure the arrears of interest. He afterwards deposited with his sister the title-deeds of his real estates, "as a collateral security for the bond debts." Subsequently, in contemplation of the marriage of the sister, the two bonds were, with the consent and privity of the obligor, settled upon trusts for the benefit of the intended husband and wife; no reference, however, being made in the settlement to the deposit of title deeds. The marriage took effect, and about four years after, the obligor became a bankrupt:—*Held*, that, assuming the consideration for the first bond to have been voluntary, yet there being no fraud suggested against any party, or insolvency proved against the obligor, the settlement was a valuable security; and that, by virtue of the bonds, the instrument of deposit, and the settlement, the trustee of the settlement was equitable mortgagee of the real estate for the monies due on the bonds. *Meggison v. Foster*. 336

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MORTGAGE AND MORTGAGEE.

EVIDENCE.

1. Discussion of the rules of evidence relating to declarations in writing by deceased persons, made in the ordinary course of business. *Pickering v. Bishop of Ely*. 249

2. The cashier of a banking-house, upon his examination as a witness, stated that he had ascertained from the clearing-book,

kept by him, and in his own handwriting, that a certain sum of money was paid in notes of a particular description. The statement was founded solely on the witness's knowledge of the book and of his own handwriting, and not from any recollection of the fact deposed to; and the book was not produced:—*Held*, that, under these circumstances, the statement could not be received as evidence of the fact deposed to, though it might serve as a ground for further inquiry. *Dupuy v. Truman*, 341

3. Deed set out in a defendant's answer made evidence for the plaintiff generally. *Attorney-General v. Higham*, 634

See ASSETS.

EQUITABLE MORTGAGE, 1, 2, 3.
PLEA AND PLEADING, 1.

EXECUTOR.

See DISCOVERY.

FORECLOSURE.

The defendants in a foreclosure suit, properly disclaiming, are entitled to their costs. *Silcock v. Roynon*, 376

See GENERAL ORDERS, 1

FOREIGN LAW.

A testator who died and whose will was proved in England, bequeathed a legacy to a married woman, whose domicile, as well as that of her husband, was in Scotland. The husband died a few months after the testator, without having received the legacy. After his decease, the executors of the testator, with knowledge of the before-mentioned circumstances of domicile, paid the legacy to the widow. It was proved, that according to the Scotch law, the payment should have been made to the husband's personal representatives:—*Held*, that in the absence of proof that the executors knew the Scotch law on the subject, the payment to the widow was a good payment. *Leslie v. Baillie*, 91

FORFEITURE.

1. A person conveyed certain freehold and leasehold property to trustees, upon trust to pay the rents and profits to his son T. for life; provided, that, in case T.

should be declared bankrupt, or be discharged under any insolvent act, the trustees should apply the rents and profits in or towards the maintenance, clothing, lodging and support of the said T. and his then present or any future wife, and his children, or any of them, or otherwise for his, her, their, or any of their use and benefit, in such manner as the trustees should in their discretion think proper. T. was taken in execution for debt, and sent to prison, at the suit of a creditor, who obtained a vesting order against him under the stat. 1 & 2 Vict. c. 110. The insolvent was afterwards discharged under that act: *Held*, that the life estate of the insolvent was forfeited at the time of his discharge; that, from the date of the vesting order to the time of the discharge, the rents and profits of the estate belonged to the assignee under the act; that, upon the discharge taking place, the discretionary power given to the trustees by the settlement might be exercised by them in favor of the insolvent, his wife and children collectively, or in favor of any of those persons to the exclusion of the others; and that, to whatever extent the power might be exercised in favor of the insolvent, the benefit which he would take by the appointment would vest in the assignee. *Lord v. Bunn*, 98

2. Testator bequeathed an annuity to his nephew for life, declaring that his nephew should have no power to sell, mortgage, incur, or anticipate it; and that, in case he should attempt so to do, the same should cease and be no longer payable to him. And after the decease of his nephew, or any such attempt to sell, mortgage, incur, or anticipate the annuity, the testator ordered the fund out of which the annuity was to be paid to be divided amongst his nephew's children. The nephew took the benefit of the stat. 1 & 2 Vict. c. 110, for the relief of insolvent debtors:—*Held*, that this was a forfeiture of the annuity, and that the children were entitled to the fund. *Brandon v. Aston*, 24

FRAUD.

A deed of gift of real estate from an aged and infirm person to his intimate friend and medical attendant, set aside for fraud; one of the circumstances in proof of fraud being that the deed stated, contrary to the truth, a money consideration. *Gibson v. Russell*, 104

FUNERAL EXPENSES.

A charge by executors for unnecessary expenses of a funeral disallowed. *Bridge v. Brown*, 181

See PLEA AND PLEADING, 9.

GAMBLING DEBT.

Bill by a party from whom a promissory note had been obtained for a gambling debt, to restrain an indorsee of the note, with, as it was alleged, notice of the consideration, from proceeding in an action at law, commenced by him against the plaintiff in equity for the recovery of the amount made payable by the note, and in which action the defendant in equity had declared. After the filing of the bill, and before any injunction had been applied for, the action at law was tried, and a verdict found for the defendant at law, the plaintiff in equity:—*Held*, on the hearing of the cause, that the judgment at law was not only admissible in evidence, but that it was conclusive in equity as to those facts as to which it was conclusive at law; but that, as the judgment was obtained after the defendant had answered, and no supplemental bill had been filed, the defendant in equity was entitled, if he thought fit to require it, to an inquiry whether the judgment had been fairly obtained. *Pearce v. Gray*, 322

GENERAL ORDERS.

1. *Quere*, whether the 30th of the orders of August, 1841, applies to the case of a bill of foreclosure of freeholds devised in trust for sale. *Wilton v. Jones*, 244

2. The 36th of the orders of August, 1842, is not applicable to the case where there is something of a specific and particular nature in the bill which the demurrer has not covered. *Dell v. Hale*, 1

See PLEA AND PLEADING, 5, 7.
PRACTICE 1, 8.

GUARDIAN AD LITEM.

See PRACTICE, 5.

HEIR-AT-LAW.

1. The Court will not, generally, decree

a will to be established against a plaintiff infant heir. *Hills v. Hills*, 327

2. On a decree for specific performance against the infant heir-at-law of a vendor, the Court, where there has been no default on either side, will give no costs on either side. *Hanson v. Lake*, 328

HUSBAND AND WIFE.

1. By a marriage settlement, the lands of the wife were limited to such uses as she should, notwithstanding her coverture, by deed or will appoint; and in default of appointment, to the use of the children of the marriage. After the husband's death, the wife, by way of appointment under the power contained in the settlement, executed three successive mortgages of the property in fee. Each mortgage deed contained a trust for sale, in default of re-payment of the mortgage money; but the language of the two latter deeds differed from that of the former, not only as to the trust for sale, but as to the proviso for reconveyance and in other respects:—*Held*, that, having regard to the construction of the latter deeds taken by themselves, and also in comparison with the former, the wife must be considered as having intended to devote the whole property to purposes beyond those of mere mortgage securities, and consequently that by the latter deeds, or one of them, the power was exhausted. *Barnett v. Wilson*, 407

2. In a suit filed by the assignees of a bankrupt against the trustees of the bankrupt's marriage settlement, and the wife of the bankrupt, for the purpose of recovering the fund subject to the wife's equity, a decree was made at the hearing of the cause, (the husband being absent from the record,) by which it was referred to the Master to approve of a proper settlement for the wife. On the cause coming on for hearing for further directions, the Court declined to proceed in the absence of the husband. *Beales v. Spencer*, 651

3. A trust for the wife's own use and benefit is not a trust for her separate use. *Ibid*

See FOREIGN LAW.

DOWER.

MARRIAGE SETTLEMENT.

ILLEGITIMATE CHILDREN.

1. Testator bequeathed one moiety of

a sum of money to the children of A., and the other moiety to the children of B. At the testator's death, A. had six legitimate and two illegitimate children, and B. had one legitimate and three illegitimate children, and the legitimate children of B. were named in the will in relation to another bequest:—*Held*, that the legitimate children of A. were entitled to one moiety of the fund, and all the children of B. whether legitimate or not, were entitled to the other moiety. *Meredith v. Ferr*, 525

2. Testator bequeathed a sum of money to the children of A., lawfully to be begotten, including her daughter E., aged about fourteen. E. was illegitimate, and A. had no other child of that name:—*Held*, that F. was entitled to share in the fund. *Ibid*.

IMPERTINENCE.

A bill sought to establish a course of dealing between the plaintiffs and L., in which the plaintiffs became indebted to L. on their private account, and he, as agent for administering the affairs of a testator, became indebted to the plaintiffs, as the testator's executors and residuary legatees; and the bill charged that an agreement having been entered into for a set-off of these respective claims, C. & Co., who were the bankers both of the plaintiffs, as executors, and of L., with full knowledge of the agreement and of the accounts being open and unsettled, and that a large sum of money would be coming to the plaintiffs on a balance of all accounts between them and L., became the indorsees of certain promissory notes given by the plaintiffs to L. for securing the sums due from them to him. The bill (which prayed an injunction to restrain proceedings at law on the notes) then contained various minute inquiries as to what dealings and transactions had taken place between L. and the plaintiffs; whether the defendants were not the bankers of both parties, and whether payments on the executorship account were not made through them, whether, by a certain written statement mentioned in the bill, it would not appear that the loans to the plaintiffs were made on certain days during a certain period, or at some other and what times; whether the accounts between the parties were not open and unsettled, or how otherwise; and whether a large sum, or what sum, of money was not due from L. to the plaintiffs, or how was the contrary made out. The defendants by their an-

swer denied notice of the agreement, and stated their belief that such alleged agreement never existed. In order to meet the inquiries contained in the bill, and also to assist them in showing that there were no open and unsettled accounts between the parties, or, if there were, that the amount of monies due from the plaintiffs to L. exceeded the amount due to them from him, they set out, *in hæc verba*, in a schedule to their answer, the before-mentioned written statement, all the promissory notes and all the acknowledgments for money given by the plaintiffs to L., and the whole of the banking account of the executors:—*Held*, that the defendants, the bankers, having been expressly called upon to answer in this minute manner as to the accounts between the plaintiffs and L., the schedule to their answer was not impertinent. *Davis v. Cripps*, 435

INFANT.

See *HEIR-AT-LAW*, 1, 2.
MAINTENANCE,
PRACTICE, 1, 5.

INSOLVENT.

See *FORFEITURE*.
HUSBAND AND WIFE, 2.
MORTGAGOR AND MORTGAGEE.

INTEREST OF MONEY.

See *LEGACY AND LEGATEE*.

INTERROGATORIES.

See *PRACTICE*, 3.

ISSUE.

See *WILL*.

JOINT-STOCK COMPANY.

See *MORTGAGOR AND MORTGAGEE*, 1.
PLEA AND PLEADING, 6.

JURISDICTION.

See *AGREEMENT*, 2.
COSTS, 3,
PRACTICE 2, 7.

LANDLORD AND TENANT.

See *ACCOUNT*.
TRUST AND TRUSTEE, 4.

LEASEHOLD ESTATES.

See *TRUST AND TRUSTEE*, 4, 6.
WILL.

LEGACY AND LEGATEE.

1. Upon the construction of a will—*Held*, that a legacy charged upon the testator's real estate, and payable when the youngest child of the testator should attain twenty-one, was vested in the legatee before that period. *Brown v. Wooler*, 134

2. Bequest of a personal fund to such of the children of J. N. as should live to attain the age of twenty-one years. J. N. had three children, two of whom, having attained twenty-one, applied for payment of their shares. Under the circumstances of the case, the Court declined to pay over to them any part of the capital, but allowed them to receive the interest of two-thirds, without prejudice to the claim of after-born children of J. N. *Brandon v. Aston*, 30

3. Upon the construction of a will—*Held*, first, that a bequest of £30 a year, from "the interest of the testator's funded money in the Bank of England," did not amount to a bequest of so much stock as would produce that annual sum, but constituted an annual charge of £30 upon the funded property for the life of the legatee. Secondly, that a bequest of £30 a year to A., together with her children B., C., and D., and for their joint maintenance, was a bequest of that annual sum to the mother and her children, as joint tenants, for the life of the longest liver of them. *Wilson v. Maddison*, 372

4. Where a testator puts himself in *loco parentis* of the legatee, the legacy will bear interest at £4 per cent. from the death of the testator. *Ibid.*

See *ADMISSION OF ADMITS*.
WILL.

LESSOR AND LESSEE.

See *ACCOUNT*.
AGREEMENT, 1.
SPECIFIC PERFORMANCE.
PLEA AND PLEADING, 4.

LIEN.

See DEBTOR AND CREDITOR, 3, 4, 5.
EQUITABLE MORTGAGE.
MORTGAGOR AND MORTGAGEE,
6.
SOLICITOR AND CLIENT.

MAINTENANCE.

1. Where a testator directs that the income of his estate shall be applied in maintenance, and the income is insufficient for that purpose, the Court will in some cases direct payment out of the capital of his personality. *Bridge v. Brown*, 181

2. Testator bequeathed an annuity to his granddaughter, to be applied whilst she was under age in and towards her maintenance and education, in such manner as his trustees should, in their absolute and uncontrollable discretion, think fit, and whether her father should be able to maintain and provide for her or not. The trustees having made a very small payment on account of the annuity, and having made no provision for the maintenance or education of the infant, who had been wholly provided for by her father, the Court declared, that, in the event of its appearing that the father had properly maintained and educated the infant from the testator's death, he should receive the whole annuity for the time past and till further notice; he undertaking properly to maintain and educate her, and to abide by the order of the Court. *Stephens v. Lawry*, 87

3. Testator gave, devised, and bequeathed to his executors all his freehold and leasehold estates, annuities, monies out upon security at interest, and every of them, upon trust to permit his wife M. to receive the rents, issues, income, profits and proceeds thereof for her own use and benefit, and for the maintenance and education of his children, naming them, so long as his said wife should continue his widow; and in case she should marry, to pay her an annuity of £100 per annum; and subject to such trusts, in trust, after the decease or marriage of M., for his said children in equal shares, when and as they should attain the age of twenty-one:—*Held*, that a trust was constituted of a sufficient part of the income of the property for the maintenance and education of the children, and that such trust was capable of continuance beyond the period of a son attaining twenty-one, or a daughter attaining that age or marrying. The Court, however being of opinion that a discretion-

ary power as to the mode of executing the trust was given to M., directed inquiries for the purpose of ascertaining how such discretionary power had been, and how it ought to be, exercised. *Longmore v. Elcum*, 363

4. Testator devised his estate at E. to trustees, upon trust to apply the rents for the maintenance and support of B. till she should attain the age of twenty-five years, or marry with consent, and to lay out the surplus of such rents in Government securities, that the same might accumulate for the uses and purposes of his will; and from and after the said B. should attain twenty-five, or marry with consent, then to pay her the whole of the rents for her life; and after her decease, upon trust for her children. The testator then gave his estate at I. to the same trustees, upon trust, in case the said B. should live to attain twenty-five, or marry with such consent as aforesaid, to permit her to occupy and enjoy and receive the rents of that estate for her life; and after her decease, upon trust for her children, in the manner before mentioned. Provided, that, in case B. should marry without consent, the testator revoked all the devises and bequests in favor of her and her issue. All the residue of his real and personal estate, and likewise his estate and premises therein-before devised for the benefit of B., in case she should die under twenty-five, unmarried, and without issue, the testator devised and bequeathed to the trustees in trust for X., Y., and Z. B. attained twenty-five, and married with consent. Between the death of the testator and her attaining twenty-five there was an accumulation of the surplus rents of the E. estate, after providing for her maintenance, and an accumulation of the rents of the I. estate:—*Held*, that she was entitled for her life to the income of the former accumulation, and absolutely entitled to the latter accumulation. *Greene v. Potter*, 517

MARRIAGE SETTLEMENT.

1. A testator made two wills, one of his English, the other of his American property. Neither of the wills referred to the other. His daughter, who was entitled to personal property under both wills, executed, previously to her marriage, a settlement of various descriptions of personal property, including specifically her property under the English will, but not mentioning or referring to her property under the American will. The settlement contained a clause providing that such further per-

sonal estate (if any) as should, during her life, become vested in, or accrue to, or be assignable by, her and her husband, should be assigned upon the trusts of the settlement:—*Held*, that this clause did not affect her American property. *Hoare v Hornby*, 121

2. In a settlement made in contemplation of a marriage between A. and B., they covenanted with each other and with the trustees, that, if B., the intended wife, should, during the coverture, become seized, or possessed of, or entitled to, any property, real or personal, by any devise, gift, or bequest in her favor, or otherwise, such property should, within six months after she should become so seized or possessed thereof or entitled thereto, be conveyed and assured to such uses, intents, and purposes as B. should appoint, and in default of appointment to B. for life, with remainder to A. for life, with remainder to the children of B.; and if there should be no children or child of B. living at the death of the survivor of A. and B., then to the use of M. L., the niece of B., her heirs, executors, administrators, and assigns. The marriage took effect, and, during the coverture, real property descended on B., which was not settled in pursuance of the covenant. Some years afterwards B. died, without issue, and without having made any appointment, leaving C. her heir-at-law. In a suit instituted by A. against C. and the trustees of the settlement, to enforce the performance of the covenant.—*Held*, that, in order to satisfy the terms of the marriage contract, the covenant must be carried into execution *in toto*; and, therefore, not only that the limitation to A. for his life, but that the ultimate limitation to M. L., though a stranger to the settlement, must take effect. *Davenport v. Bishopp*, 451

See HUSBAND AND WIFE.

MASTER'S REPORT.

See ASSETS.

MEMORANDA, 91, 283, 538.

MISREPRESENTATION.

See VENDOR AND PURCHASER.

MORTGAGOR AND MORTGAGEE.

1. A person having purchased an estate for the purpose of building upon it, mortgaged it to a Joint Stock Banking Company with whom he dealt, to secure sums then due, and all sums thereafter to become due, from him to them, on any banking or other account whatever, "so as the whole amount of principal monies to be ultimately recovered or recoverable by virtue of that security should not exceed the sum of £5800, together with interest." By the mortgage-deed, a power of sale was given to the company. The mortgagor built three houses on the land, which were successively sold to different purchasers. The purchase monies were not paid to the mortgagor, but to the company, who gave the mortgagor credit for them in his account:—*Held*, that these sums were received by the company by virtue of the mortgage security, and, so far as they were applicable as principal monies, must be considered as received by them in discharge of the sum of £5800, and not merely on the general account between them and the mortgagor. *Johnson v. Bourne*, 268

2. A. mortgages an estate to B., to secure future advances. He then mortgages the same property to C., who gives notice of his security to B. *Quare*, whether the rights of B. under his mortgage security are affected by the transaction between A. and C. *Ibid*.

3. Bond and mortgage given by an only son to his father—*Held*, under the circumstances of the case, to be a running security for advances actually made, and not a security for the precise amount expressed in the instruments. And there being no evidence against the son as to the amount of the actual advances, he was charged in that respect to the extent of his admissions only. *Melland v. Gray*, 199

4. On the 2nd of May, 1837, freehold and copyhold estates were mortgaged by C. to T., subject to a proviso for redemption on payment of £10,000 on the 2nd of May, 1844, with interest half-yearly in the meantime. Prior to any default, C. paid to T. £7000 by cheque, and gave him two bills of exchange, drawn by C. & Co. upon and accepted by C., for £1620, at three months after date, and for £1500 at six months after date, being together the total amount of the mortgage debt and interest. Upon the receipt of the cheque and two acceptances, T. signed the following memorandum:—"London, 23rd De-

ember, 1839—Received this day of C., the sum of £7000 in cash, and two bills of exchange, as under, for £3120, drawn by C. & Co., of M., upon and accepted by the said C., one, dated 16th December, for £1620, the other dated the 23rd of December, for £1500 and which cheque for £7000 and bills for £3120, making together £10,120, are in full of principal and interest due to me upon a mortgage of C.'s freehold property in K. and S. for £10,000, and I do hereby undertake, whenever required, to execute a conveyance of the said property. (Signed) T." T. gave this memorandum, together with the title and mortgage deeds of the premises, to C. The cheque for £7000 was paid, but both the bills of exchange were dishonored; C. afterwards conveyed all his estate to a trustee for the benefit of his creditors, and then became bankrupt. T. never re-conveyed the premises:—*Held*, that, as between T. and C., and his assignee by deed, and his assignees in bankruptcy, the receipt of the cheque and bills, and the giving the above memorandum, did not discharge the mortgaged premises from the mortgage, but that on their dishonor T. was entitled to a decree against them all for the restoration of the title and mortgage deeds, and to a decree of foreclosure.

Teed v. Carruthers,

31

5. Upon a bill filed to set aside a mortgage security for fraud, circumstances of oppression and misconduct being proved against the mortgagee—It was *held*, that, inasmuch as, if solvent, he would have been liable to pay part at least of the costs of the suit, being insolvent, he was not entitled to receive costs. *Rider v. Jones*,
Rider v. Sturgis,

329

6. The attorney of a mortgagee held the mortgage-deed, claiming a lien upon it against his client, to an amount at least equal to the value of the security. The mortgagee took the benefit of the Insolvent Debtors act. Upon a bill filed by the mortgagor to set aside the security, or to redeem, the Court, on the application of the mortgagor, ordered the attorney, though not a party to the suit, but who appeared on a petition, to deliver the deed to the mortgagor, upon payment of what was due from the mortgagor under the security, in satisfaction of the lien. *Rider v. Jones*
Rider v. Sturgis,

329

7. The provisional assignee, under the Insolvent Debtors Act, was made a defendant to a bill of which the object was to set aside a mortgage security taken by the insolvent from the plaintiff:—*Held*,

under the circumstances of the case, that the assignee was not entitled to receive the costs of the suit from the plaintiff.

Ibid

8. A., being seised in fee of a freehold and copyhold estate, borrows various sums of money of B., amounting in the whole to £4000, upon mortgage of the freehold estate alone. A. afterwards, in 1832, borrows £500 more of B., on the security of both the freehold and copyhold estate. This mortgage is effected by distinct instruments relating to each property respectively, neither of them referring to the other. In 1833, A. borrows a sum of £400 of C., on mortgage of the freehold estate alone subject to B.'s incumbrances thereon. Again in 1838, A. being indebted to D. in £600, executes to him a mortgage for that sum of the copyhold estate alone, without notice of the £500 incumbrance. In 1837, B. has notice of C.'s security, and in 1838, (after having sold both the estates, under powers of sale, and received the purchase money,) he has notice of D.'s security. The produce of the freehold estate being insufficient to pay B. and C. in full, but that of the freehold and copyhold being sufficient for that purpose, C. claims to have the whole of the £500 charge thrown upon the produce of the copyhold estate, in order that he may receive payment out of that of the freehold; on the other hand, D. claims to be paid the whole of his debt out of the produce of the copyhold estate, in priority to C.:—*Held*, that the claim of neither party can prevail to the fullest extent; but that the £500 being by the security of 1832 charged on the freehold and copyhold estates rateably, (that is to say, in proportion to their respective net values,) and without preference, C. has an equity, of the nature claimed by him, to the extent of that proportion of the £500 which is charged upon the copyhold estate, while in other respects, in relation to that estate, D. has priority over C. *Bugden v. Bignold*,

377

9. The court-rolls of a manor are not constructive notice of prior incumbrances to a purchaser of copyholds holden of the manor.

Ibid.

10. Mr. Jenyns made a mortgage to Shephard for £4000, of three different estates, namely, an estate called Lynwood Farm in Cambridgeshire, an estate at Westminster, and certain fee-farm rents elsewhere. Afterwards Jenyns made (which was the second in point of time) a mortgage to Titley, and comprised therein nothing but Lynwood Farm; after this

Jenyns made an absolute sale of the fee-farm rents to Sir Thomas Peyton, and afterwards Jenyns made another mortgage to Davies of the Westminster estate; and *Titley having paid off Shephard's mortgage*, was decreed to hold as well the Westminster estate as Lynwood Farm, until he was paid as well what was due to him upon the mortgage originally made to himself as what he had paid to Shephard upon his mortgage; and, upon a rehearing, Titley was also decreed to hold the fee-farm rents until he was paid all that was due to him upon both his securities. *Titley v. Peyton and others* Trin. Term, 16 & 17 Geo. 2 in Chan. by Lord *Hardwicke*: and his former decree, whereby the plaintiff's bill stood dismissed against Sir Thomas Peyton, was varied. And, as I heard, Lord *Hardwicke* held, that if Jenyns had not made any mortgage to Davies of the Westminster estate, Davies [*qu. Titley*?] would have had a clear right, as against Jenyns, to have redeemed Shephard, and have detained both estates till he was satisfied both debts; and if this be so, then, by making the mortgage of Lynwood Farm (which was second in point of time) to Titley, Jenyns conveyed to him a right of redeeming the whole and retaining as aforesaid; and if so, then, by afterwards making the mortgage to Davies, it was impossible for Jenyns to alter that equitable right conveyed by him to Titley.—*Mr. Serjeant Hill's note to Viner*, Vol. 15, p. 447. [See also, R. L. 1742, B. fo. 593.] *Titley v. Jenyns*, 399

11. A., for valuable consideration, takes a security upon a reversionary sum of stock, at a time when, by reason of the death of the person in whose name the stock stood without legal representatives, no notice of the incumbrance could be given to the trustee of the fund. A., however, does not attempt, by *distringus* or otherwise, to perfect the security. Afterwards B. for valuable consideration and without notice of A.'s incumbrance, takes a security upon the same fund, and at the same time serves a writ of *distringas* on the Bank of England. B.'s security has a priority over that of A. *Etty v. Bridges*, 486

12. One of several mortgages compelled to pay the costs, and another refused his costs, of a suit to redeem the mortgage; and the interest on the mortgage money declared to stop on the day of the tender. *Cliff v. Wadsworth*, 598

See CREDITOR'S SUIT, 2.
DEBTOR AND CREDITOR, 4.
EQUITABLE MORTGAGE.

See FORECLOSURE.
HUSBAND AND WIFE.
PRODUCTION OF DEEDS, 2.

MULTIFARIOUSNESS.

The two executors of a testator, having employed an agent to act for them in the administration of their testator's estate, borrowed money of him on their private account, for which they gave him their separate promissory notes. The agent indorsed these notes over to certain creditors of his own. Upon a bill filed by the executors against the indorsees and the agent, praying for an injunction to restrain two separate actions brought by the indorsees against the plaintiffs respectively on their separate notes—*Held*, on demurrer, that the bill was not multifarious, the object of it being also to obtain an account of all monies received by the agent in respect of the testator's estate, and to establish an agreement (of which it was alleged that the indorsees had notice) whereby the monies due on the notes were to be set off against the monies so received by the agent. *Davis v. Cripps*, 430

NEXT OF KIN.

See WILL, 12.

NOTICE.

See MORTGAGOR AND MORTGAGEE, 9.

ORDERS.

See GENERAL ORDERS.

PARTIES

See CREDITOR'S SUIT.
DISCLAIMER, 1, 2.
PLEA AND PLEADING.

PATENT OFFICE.

By a grant of patent, dated in 1801, the then bishop of Ely having, as the grant stated, "confidence in the probity, fidelity, care and industry of P." granted to P, who was a solicitor, "the office of receiver of all issues, profits, sum and sums of money, arising and issuing" from the possessions of the see, to hold to P. by himself or his sufficient deputy or deputies to be approved

of by the bishop and his successors, for his life. The office of receiver was an ancient office, and had been exercised before the restraining statute of 1 Eliz c. 19. P. held the office under three successive bishops, during the whole of which time he not only received the rents, but negotiated the renewals of leases, and prepared the leases of those, and likewise attended all searches for records in the bishop's muniment room, of which he kept a key; for the performance of which acts he received fees and emoluments. It appeared also that his predecessor in office, who had held the office since 1785, had done the same. Upon the accession of A. to the bishopric in 1836, he refused to admit P.'s claim of right to perform these last-mentioned acts; upon which P. filed his bill against the bishop, praying a declaration of the rights in question in his favor, that he might be quieted in the possession of the office, and that the bishop might be restrained by injunction from obstructing the plaintiff in the exercise of such rights, and from doing acts in contravention of them:—*Held*, first, that the plaintiff's claims were not of such a nature as to induce this Court to interfere to protect them, without being well satisfied (which the Court was not) that his legal remedy was insufficient to do him complete justice; and, secondly, that the relief sought being analogous to the specific performance of an agreement, the bill must fail on the ground of want of mutuality; the nature of the duties and services asserted by the plaintiff being such as to preclude the possibility of a decree in this Court against him, compelling their specific performance. *Pickering v. The Bishop of Ely*, 249

PAUPER.

See PRACTICE, 2.

PLEA AND PLEADING.

1. An allegation of an assignment of an interest in the suit from one co-plaintiff to another, who is not otherwise a proper party, must be proved at the hearing. *Sayer v. Wagstaff*, 230

2. Upon the death of the vendor of an estate, certain persons, who, under an order in a suit in Chancery, had been appointed trustees of the vendor's personal estate for the purposes of his will, filed their bill against the representatives of the purchaser, for specific performance of the agreement for sale. After the commence-

ment of the suit, one of the trustees, who was also executor of the vendor, died:—*Held*, that the suit thereby became wholly abated. *Cave v. Cork*, 130

3. A bill for specific performance of a contract for the sale of real estate was brought against the heir of a purchaser, alleging that he, in his ancestor's lifetime, took upon himself the contract. To this suit the administratrix of the purchaser who died many years before the filing of the bill, was made a defendant, and upon her death (after alleging by her answer that the intestate's estate had been duly administered) the suit was revived against the grantee of limited letters of administration *de bonis non* of the effects of the purchaser, the plaintiff not seeking any general administration: *quære*, whether such grantee was a proper and sufficient party to the revived suit, or whether the general personal representative of the purchaser ought to have been made a party. *Cave v. Cork*, 130

4. A bill for an account of dilapidations was filed by the reversioner of a lease against the personal representatives of a person whose interest in the lease appeared to be that of equitable tenant for life, with remainders over, alleging that such person in his lifetime was in possession during the time the dilapidations accrued, that he paid rent, and was liable to the covenants in the lease, and that on his death the defendant entered into possession as his administrator, paid rent, and became liable under the covenants:—*Held*, that there was not a sufficient allegation of debt to support the bill. *Arkwright v. Colt*, 4

5. To a bill filed by A. against B., to recover a customary estate, all persons claiming adversely against B., under the custom, or by various constructions of the custom, are necessary parties, nor can A., with respect to those persons, avail himself of the provisions of the 23rd Order of August, 1841. *Marke v. Locke*, 500

6. The directors of a joint stock company, consisting of upwards of 500 members, made certain calls, which the majority of the shareholders paid, but which six of them, alleging that the calls were fraudulently made, refused to pay, and filed their bill, on behalf of themselves and all other the shareholders except the defendants, against the directors, trustees, and secretaries of the company, praying for an account of the debts and assets of the partnership, a receiver, an injunction to restrain the defendants and all officers and servants of

the company from dealing with the partnership property, an account of the debts and liabilities of the company, and to have the property applied towards the payment of its debts and liabilities:—*Held*, that, some at least of the absent shareholders, who had paid up the disputed calls, ought to be made parties to the suit. *Richardson v. Larpent*, 507

7. Where a cause is set down for hearing, upon the defendant's objection for want of parties, under the 39th Order of August, 1841, the Court will assume for the purpose of deciding that objection only, the defendant's answer to be true. *Ibid*.

8. Where a person is seized of an estate in fee, defeasible by a conditional limitation, shifting use, or executory devise, the inheritance is not represented in this Court merely by the person who has the defeasible estate. *Goodess v. Williams*, 595

9. In an administration suit against a surviving executor, it is not necessary, in all cases, to bring before the Court the representative of the deceased executor. *Masters v. Barnes*, 617

See ACCOUNT.

CREDITOR'S SUIT, 1, 2.

DISCLAIMER, 1, 2.

DISCOVERY.

GAMBLING DEFT.

GENERAL ORDERS.

HEIR-AT-LAW.

IMPERTINENCE.

MULTIFARIOUSNESS.

PRACTICE.

1. Upon a motion for leave to enter a memorandum of service of a copy of the bill upon a defendant, under the 24th of the orders of August, 1841, it is not necessary to show by affidavit that the defendant is not an infant. *Sherwood v. Rivers*, 166

2. This Court, either by virtue of its general jurisdiction, or under stat. 11 Geo. 4 & Will. 4, c. 36, rule 17, has power to discharge a pauper defendant out of custody, without compelling him to pay costs incurred previously to the order to defend *in forma pauperis*. *Bennett v. Chudleigh*, 164

3. A commission to examine witnesses, and the depositions taken thereunder were intitled in an original and revived suit, but the interrogatories were intitled as in a

single suit, though in a manner applicable to the original suit, or to the suit as revived:—*Held*, that the interrogatories were not wrongly intitled, and a motion to suppress them was refused. *Jones v. Smith*, 42

4. *Quære*, whether a decree by default can be had on a Seal-day. *Matthews v. Matthews*, 318

5. Guardian ad litem to infant defendants, resident within the jurisdiction, appointed without a commission. *Drant v. Vause*, 524

6. Upon an application for substitution of service of subpoena to appear and answer, on the general solicitor of a defendant who was out of the jurisdiction, the Court, in the existing state of authorities on the subject, referred the applicant to the Lord Chancellor. *Noad v. Backhouse*, 529

7. Receiver appointed of a Government pension, the trustee being out of the jurisdiction. *Ibid*.

8. Under the 8th of the orders of August, 1841, the plaintiff may obtain leave to enter an appearance for the defendant to an amended bill. *Firth v. Hopkins*, 530

9. Where it appeared that the association of a cestui que trust and trustee, as co-plaintiffs on the record, might materially injure the interests of the former, the Court gave leave to amend the record by striking out the name of the trustee as plaintiff, and making him a defendant. *Hall v. Lack*, 631

10. Form of order for the re-examination, after decree, of witnesses who have been examined in chief. *Manson v. Burton*, 647

11. The plaintiff sued *in forma pauperis* and had had counsel and Six Clerk assigned to him. He had also, before and at the time of the decree, and since in the Registrar's and Master's offices, employed a solicitor, who did not appear to have been changed by him or discharged by the Court:—*Held*, that he could not present a petition not having the sanction of such solicitor or some other officer of the Court. *Perry v. Walker*, 655

See COSTS.

DISCLAIMER.

HEIR-AT-LAW, 1, 2.

IMPERTINENCE.

See PLEA AND PLEADING.

PRODUCTION OF DEEDS AND PAPERS.
SEQUESTRATION.

PRINCIPAL AND AGENT.

See MULTIFARIOUSNESS.

PRIORITY OF INCUMBRANCE.

See MORTGAGOR AND MORTGAGEE.

PRODUCTION OF DEEDS AND
PAPERS.

1. To entitle confidential communications to the protection which is ordinarily extended to them in a suit, it is not necessary that they should have been made in contemplation of the suit; it is sufficient if they relate to, and were made in the course of, the dispute which is the subject of the suit. *Clagett v. Philipps*, 82

2. Mortgage-deed in the hands of the mortgagee, ordered, on the application of the mortgagor, to be produced for the purpose of inspecting an indorsement on the instrument. *Philipps v. Evans*. 647

See DISCLAIMER, 2.
DISCOVERY.

PROMISSORY NOTE.

See GAMBLING DEBT.

PROMOTIONS.

See MEMORANDA.

RAILWAY ACTS.

See SPECIFIC PERFORMANCE.

RECEIVER.

See PRACTICE, 7.

RENEWAL OF LEASE.

1. Testator bequeathed to his wife the interest and dividends of such stock as should be standing in his name at his decease, during her life; and he directed that

at her decease one moiety of such stock "subject to and after deducting such premium or sum of money as should be necessary for the renewal of the Crown lease of the leasehold messuages which he purchased of Sir H. T., in case he should not have renewed such lease in his lifetime," should go to his five children. In a subsequent part of the will, he gave to his son G. all his leasehold houses which he purchased of Sir H. T., to hold to his said son and his executors, &c., for the then existing term or terms therein, and "all benefit of renewal aforesaid," for his and their own use and benefit. At the time of the widow's death the lease was subsisting unrenewed:—*Held*, that there was a gift to the son out of the Consols of a sum of money sufficient to effect the renewal of the lease, and that by the "renewal" of the lease was intended a grant at the widow's death of a reversionary lease, to commence at the expiration of the former lease, for the same term, at the same rent, and under the same covenants as were mentioned and comprised in the former lease, or as near thereto as the law by which Crown leases are regulated would allow. *Rickards v. Rickards*, 419

2. One who had purchased a Crown lease, which had been granted upon payment of a certain fine, and subject to a certain rent, and to the expenditure of a certain sum for repairs during the term, bequeathed the lease to his son, with a direction that at the death of his wife the lease should be renewed for the benefit of the son, and the money necessary for the renewal paid out of a certain sum of stock. By act of Parliament the officers of the Crown are bound to renew Crown leases upon certain terms, depending on the value of the property; and upon the death of the widow, they declined to renew the lease for the son, except upon payment of considerably higher sums for fine, rent, and repairs:—*Held*, that the son was entitled to receive out of the stock, as at the death of the wife, such sum *by way of fine* as should be necessary for the renewal of the lease; and that, in calculating that sum, but not otherwise, the amount required for repairs might be considered. *Rickards v. Rickards*, 412

See TENANT FOR LIFE, 1.
TRUST AND TRUSTEE, 4.

RESIDUARY ESTATE.

See AGREEMENT.

REVERSIONARY INTEREST.

See MORTGAGOR AND MORTGAGEE, 11.

SEAL-DAY.

See PRACTICE, 4.

SEQUESTRATION.

1. A person who had refused to pay the rent of a sequestered estate, which he occupied as tenant to the sequestrators, except under an indemnity, was nevertheless held entitled to his costs of a motion by the sequestrators to compel payment of the money. *White v. Wood*, 615

SOLICITOR AND CLIENT

Solicitor in a suit, who had been discharged by the client, but had not delivered his bill of costs within the proper time ordered, under the circumstances of the case, to deliver the papers and documents in his possession relating to the suit (without prejudice to his lien, to the new solicitor. *Cooper v. Hewson*, 515

SPECIFIC DEVISE.

See WILL.

SPECIFIC PERFORMANCE.

This Court has Jurisdiction to enforce the specific performance of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages. *Storer v. Great Western Railway Company*, 48

See HEIR-AT-LAW, 2.

PATENT OFFICE.

PLEA AND PLEADING, 3.

STATUTE OF DISTRIBUTIONS.

See WILL, 8.

STATUTE OF FRAUDS.

See TRUST AND TRUSTEE, 4.

TENANT FOR LIFE.

1. A., under a voluntary settlement, of which it did not appear that she had notice, was entitled to certain leaseholds, held for lives, for the term of her life, with remainder to B. Under a subsequent voluntary settlement she took a life interest in the same leaseholds, with an absolute power of appointment over the residue of the leasehold interest. While in possession of the property she took a renewed lease of it, and died, having appointed all her interest to C.:—*Held*, that the renewal ensured to the benefit of B. *Waters v. Bailey*, 219

2. Equitable tenant for life of copyholds, under a will which contained no special provision for the payment of expenses on admission, died without having paid the fines and fees incurred on the admission of a trustee in her lifetime. By her will she bequeathed her personal estate to her daughter for life for her separate use, and after her decease to her children. The daughter and her husband and children took estates in remainder in the copyholds: *Held*, that, having regard to the frame of the will under which the tenant for life was entitled, and to the interest which the parties entitled to the copyhold estates took in the personal estate of the tenant for life, one-third of the fees was properly payable out of the corpus of the personal estate of the tenant for life, the husband of the daughter consented to pay the residue. *Bull v. Birkbeck*, 447

3. A testatrix, by her will, devised certain messuages and hereditaments unto trustees and their heirs, to the use of the trustees, their executors and administrators, for the term of ninety-nine years, with remainder to the use of A. for life, and after her decease to the use of B. for life, and after his decease to the use of the first and every other son of his body, lawfully begotten, severally and successively, according to priority of birth, and of the heirs male of the body and respective bodies of such first and other son and sons, and in default of such issue to the use of C. for life, with remainder to his first and other sons in tail male, with remainders over. The trusts of the term of ninety-nine years were declared to be, that the trustees should out of the rents and profits of the estates, insure the messuages, and keep the same in good repair during the respective lives of the several tenants for life, and should, during the respective minorities of each and every person thereby made tenants for life or in tail, apply the

surplus or residue of the rents and profits for and towards the maintenance and education of the tenants for life or in tail who for the time being should be entitled in possession to the estates; and in case the whole of the surplus of the said rents and profits should not, during the minority of any such tenant for life or in tail as aforesaid, be applied for his or her maintenance and education, then the surplus thereof was from time to time to be laid out on real or Government securities, at interest, in the names of the trustees, upon trust for such person or persons from time to time as for the time being should, under the limitations of the will, be entitled in possession to the said estates; and if any person who might become entitled in possession or remainder to an estate tail in the estates under any of the said limitations should die under twenty-one, without issue inheritable to such estate tail, then so often as any such event should happen within the period of time in which executory devices were allowed by law to take place, the absolute interest in the monies so directed to be laid out and invested was to be considered as not having vested in such person, but the same was to go over to the taker:—*Held*, that the first tenant for life in possession of the estates was not absolutely entitled to the accumulations of the rents and profits which had accrued during his minority, but was only tenant for life of such accumulations. *Crosse v. Glenzie*, 237

4. Upon the construction of a will—*Held*, that chattel leaseholds were to be enjoyed in *specie* by the tenant for life of the residuary real and personal estate. *Daniel v. Warren*. 290

See PLEA AND PLEADING, 4.
VENDOR AND PURCHASER, 1.
WILL

TITHES.

1. A rector, who took a composition for his tithes every Michaelmas, died in January, 1841. The new rector was collated in the following April, and before harvest time he employed a surveyor to value the tithes. The surveyor furnished him with a report, stating what he considered ought yearly to be paid by each of the occupiers as a composition in lieu of tithes. In August, the new rector required the respective occupiers to pay him, as a compensation for their tithes, the amount mentioned by the surveyor. The occupiers accordingly, in November, 1841, made their pay-

ments according to the surveyor's report, for the whole year from Michaelmas, 1840, to Michaelmas, 1841:—*Held*, that the representative of the late rector was entitled to be paid by the new rector a proportion, according to the time which elapsed from Michaelmas, 1840, to the late rector's death, of the composition which existed in the late rector's lifetime. *Oldham v. Hubbard*, 209

2. *Semble*, that a composition for tithes is within the statutes 11 Geo. 2, c. 19, s. 13, and 4 Will, 4 c. 22. *Ibid*.

TRANSFER OF STOCK.

See TRUST AND TRUSTEE, 3, 6, 7.

TRUST AND TRUSTEE.

1. By a deed of trust of 1682, for the appointment of a vicar it was declared, that upon the death of any of the trustees, the survivors should, from time to time, when and as often as they should think fit, before the number of trustees should be reduced to the number of five, or within three months after they should be reduced to the number of four, appoint new trustees, and convey the premises to them, so as to complete the number of nine trustees. It appeared that, from the date of the deed to the election of a clerk in 1840, this clause had never been strictly acted upon, though the number of the trustees had generally been kept up to nine:—*Held*, that the informality in the appointment of the trustees did not vitiate the election. *Attorney-General v. Cuming*, 139

2. Charges by trustees for money laid out in luxuries, under colour of maintenance, and for money unnecessarily expended in pulling down and rebuilding a house, disallowed. *Bridge v. Brown*, 181

3. A person who was entitled to certain stock standing in the names of two trustees gave instructions to his attorney to prepare a settlement of it for the benefit of A., B., and C., and to procure from the trustees a transfer for the purposes of settlement. The settlement was prepared, and a power of attorney for the transfer of the stock executed by both the trustees, but the intended settlor died without having seen the settlement, and before the stock was actually transferred:—*Held*, that no trust of the stock was constituted for A., B., and C. *Coningham v. Plunkett*, 245

4. A person who occupied a large farm as tenant under a lease fell into difficulties, and surrendered his lease to his landlord. The tenant had, by means of his private expenditure, increased the value of the property by about the rate of £100 per annum. The brother of the tenant's wife then applied to the landlord to become tenant of the farm for the residue of the term, at the rent and under the covenants comprised in the surrendered lease. This application was made by letter, in which the writer stated it to be his wish to be of use to his unfortunate sister and her young family, and spoke of his disinterested motives. The application was acceded to by the landlord with the sole view, as he stated in his evidence, of benefiting the sister and her family. By a subsequent arrangement, it was agreed that a third person should be joined as lessee with the brother, who should manage the bulk of the property, and give the property £55 per annum for his occupation, the brother underletting the residue of the property. In his letters respecting this arrangement, the brother expressed himself as having taken the farms with no selfish motives, but from a wish to assist his sister and her unfortunate family. This arrangement was acted upon until the brother's death; the brother for some years receiving the £55 (which was secured to him by the bond of his co-lessee) and underletting the residue of the premises £45 per annum:—*Held*, that by means of the letters, (which the Court considered to be a sufficient manifestation in writing within the Statute of Frauds,) aided by parol evidence of the circumstances under which they were written, a trust was created of the annual sums of £55 and £45 in favor of the sister and her children, and (the husband waiving all interest herein) that the sister and her children took as joint-tenants. *Morton v. Tewart*, 67

5. Where by a settlement a certain number of persons are appointed trustees, and power is given, upon the death or retirement of a trustee or trustees, to appoint any other person or persons to be a trustee or trustees in his or their room, the appointment of a greater than the original number of trustees is not a valid exercise of the power. *Ex parte Davis*, in the matter of *Clark*, 468

6. Under the provisions of a marriage settlement, trustees had power, with the consent of the husband and wife, or the survivor, to vary the securities by selling out the settled stock and investing it in land, and it was provided that it should be

lawful for the trustees, with the consent of the husband and wife, or the survivor, to lay out the whole of the monies to be produced by the sale of the stock in the purchase of freehold or copyhold estates of inheritance, or leasehold for a term of not less than sixty years. The husband died, and the wife married again:—*Held*, that the trustees were not bound, on the application of the wife and her second husband, to invest any of the stock on leaseholds, although the security might be eligible, and for a longer term than sixty years. *Lee v. Young*, 532

7. Testator bequeathed £500 to his executors, upon trust that they should lay out and invest the same in the public funds, or in such other security, or in such other manner as to them should seem expedient, at interest, and pay and apply the produce to a charitable purpose. One of the executors, who took the entire management of the estate, paid the debts and most of the legacies of the testator, but neither specifically appropriated nor invested £500 for the charity. He paid interest, however, on £500 to the charity; at the same time receiving interest on the promissory note of a debtor to the estate who was in good credit, but whose debt was the only fund available for payment of the legacy. The executor afterwards died. On the admission, by his representatives, that he had in his lifetime assented to the payment of the legacy to himself, as trustee:—*Held*, that his estate was severally answerable as for a breach of trust. *Attorney-General v. Higham*, 634

See ADVOWSON.

VENDOR AND PURCHASER.

1. Specific performance of a contract for sale of an estate in fee simply decreed in favor of a vendor who at the time of the contract was tenant for life only; the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor, and the vendor being able, by means of the consent of the parties interested in remainder, to make a good *prima facie* title to the fee simple at the hearing. *Salisbury v. Hatcher*, 54

2. A contract for the purchase of an estate, rescinded at the suit of the purchaser, on the ground of fraudulent misrepresentation; the contract having been completed with the knowledge, on the part of the defendant or her agent, of the existence of a public right of way over the property, and

the plaintiff not knowing or having the means of knowing that fact. *Gibson v. D'Este*, 542

See PLEA AND PLEADING, 1, 2, 3.

VESTED INTEREST.

See LEGACY AND LEGATEE.
WILL.

VICAR.

See ADVOWSON.
TITHES.
TRUST AND TRUSTEE, 1.

VOLUNTARY SETTLEMENT.

See WILL, 7, 10.

WILL.

1. A testator gave £150 to A., and B., at their respective ages of twenty-one, or days of marriage, which should first happen; but in case either of them should die without issue before his or her legacy should become payable, then his or her legacy was to be paid to the survivor and his or her issue. The testator then gave the residue of his estate unto his granddaughters C. and D., equally to be divided between them, and if but one of them should attain twenty-one, then the residue was to go to the survivor; and he declared that the provision thereby made for C. and D. should not be subject to the control of their husbands, but should be vested in his executors, in trust, for the benefit of C. and D., and their issue respectively, until they should attain twenty-one, being unmarried, or, if married, until a proper and adequate settlement should be made upon them and their issue; but in case they should both die before they attained twenty-one, and without having issue, then he gave the residue over. C. and D. both lived to attain twenty-one:—*Held*, that although the word "issue" in the bequest to A. and B. could clearly only mean children, yet it did not follow, of necessity, that in the subsequent bequest to C. and D. it must have the same limited construction put upon it; but that it included all the issue of C. and D. living at their respective deaths generally, and that such issue took *per capita* as tenants in common. *Head v. Rendall*, 231

2. Testator bequeathed the sum of £2000 in trust for his niece, and if she should die without leaving any issue to attain the age of twenty-one, then in trust for his sister. The niece being unmarried—*Held*, that she had not an absolute vested interest in the £2000. *Daniel v. Warren*, 290

3. Under a bequest of residuary personal estate to the Westminster Hospital, Charing-cross—*Held*, that, under the circumstances of the case, the Charing-cross Hospital was entitled, in preference to the Westminster Hospital or the Royal Westminster Ophthalmic Hospital. *Bradshaw v. Thompson*, 295

4. Testator bequeathed the residue of his real and personal estate, upon trust for his daughter absolutely, upon her attaining twenty-one; provided that in case his said daughter's decease should happen before the said age of twenty-one, and his (the testator's) wife should then be living, then in further trust to pay her the whole interest of the residue of his estate and effects; and on her decease, his said daughter being dead before the age of twenty-one, he devised to his wife the house in S. street her heirs and assigns for ever; then in further trust to pay the produce of his residuary estate unto and amongst his nephews and nieces, the children of his sister Ann, and such of them as should be then living. The daughter died without issue in the lifetime of the wife. The sister had five children living at the death of the daughter and one only, Isaac, living at the death of the wife:—*Held*, that Isaac was entitled to the whole residue. *Hetherington v. Oakman*, 299

5. "And" construed "or" for the purposes of the construction of a will. *Ibid*.

6. Testator commenced his will with a direction that all his debts and all his funeral and testamentary expenses should be paid by his executors as soon as conveniently might be after his decease:—*Held*, upon the construction of the whole will, that this clause had not the effect of charging real estate of the testator, whether devised to the executors or otherwise, with the payment of his debts. *Symons v. James*, 301

7. A person transfers a sum of stock into the names of trustees, and, by an indenture under his hand and seal, declares that the stock shall be held by the trustees upon certain trusts for the benefit of A. and her children by the settlor. The settlor afterwards obtains from the trustees a

re-transfer of the stock to himself and raise the seals from the deed. By his will, not referring to the deed, he gives A. an annuity and other benefits, and the residue of his estate to the children: A. is entitled to the provision made for her both by the deed and the will. *Smith v. Lyne*, 345

8. Testator bequeathed the residue of his personal estate to his wife for life, and after her decease to his sister for life, for her separate use, and after her decease to such person or persons as under the Statute of Distributions should be legally entitled to the same: *Held*, that there was no intestacy as to the residue after the death of the sister, but that it was bequeathed either to the next of kin of the testator living at his death, as joint-tenants, or to the next of kin of the testator, or of the sister, living at the death of the sister, as tenants in common; and consequently that the wife, who died in the sister's lifetime, was not entitled to anything beyond a life interest in the residue. *Godkin v. Murphy*, 351

9. Testatrix bequeathed a sum of stock to trustees, upon trust to pay the dividends thereof to her grand-daughter for life, and after her decease in trust to assign, transfer, and dispose of the capital unto and among the children of her said grand-daughter, share and share alike, at their ages of twenty-one, or sooner if the trustees should think proper; and in case the said grand-daughter should die without leaving any child or children, or leaving such, all of them should die before they or any of them should become entitled to the trust monies, then in trust to assign and transfer the capital to A. The will contained no clause of survivorship among the children. The grand-daughter had eleven children, of whom seven died in her lifetime, two only out of the seven having attained twenty-one. The four survivors attained twenty-one:—*Held*, that the six children who attained twenty-one took vested interests in the stock, and that, upon the death of their mother, the whole stock was divisible amongst them or their representatives, in six equal shares. *Mair v. Quilter*, 465

10. Under a proviso in a settlement, to which A. and his eldest son, B., were parties, a use which was limited to a younger son, P., and his issue, was made to shift to B., in the event of P. becoming entitled in possession to the manor of S., under certain limitations, which in the settlement were described as being contained in the will of

A., bearing even date therewith. The will of A. contained the limitations mentioned in the settlement, but did not bear even date therewith, but a posterior date, which was written upon an erasure not accounted for:—*Held*, that, inasmuch as, under the circumstances of the case, the variance between the real date of the will and that mentioned in the settlement did not affect the substantial intention of the parties, the arrangement between them could in equity be carried into execution notwithstanding such variance. *Honywood v. Honywood*, 471

11. Testator, by his will, directed that the profits of his share of a leasehold colliery should, during the time that the same was worked or workable, be equally divided amongst "his wife and children and their children after them respectively":—*Held*, upon the construction of the whole will, that the words "their children after them respectively" were words of limitation. *Snowball v. Procter*, 478

12. Bequest of residue to A. for his life, and his heirs male after him; and if he should not leave any son, then to go to B. and his heirs male. Upon the death of A. without leaving male issue, the limitation to B. takes effect. *Mansell v. Grove*, 448.

13. Testator bequeathed all the stock in the funds which he might die possessed of, to trustees, upon trust to pay an annuity to his wife for life, and after her decease upon trust to pay and apply the dividends of the stock to and for the proper use and benefit of E., the eldest daughter of his brother J., and the other children of his said brother, in equal shares, for their respective lives. And he directed that the principal stock should be divided and apportioned to and amongst all and every the lawful issue of the said E., and the other children of his said brother, in equal shares and proportions, and be assigned to them respectively, upon their severally attaining the age of twenty-one years, and to the survivors or survivor of them. He left the residue of his estate to his wife. By a codicil he explained that by E. the eldest daughter of his brother, he meant an illegitimate daughter called E. At the date of the testator's will and of his death, his brother had three children only; namely, E., M., and J. Of these, E. survived the widow and had a child, who also survived the widow; M. died in the widow's lifetime, leaving a child who survived the widow; and J. died in the widow's lifetime without leaving issue:—*Held*, that by the expression "E. and the other chil-

dren," the testator intended the three children of his brother living at the date of the will; that each of the three children took a life-interest only in one-third of the dividends; and, consequently, that upon the death of the widow, E. took a life-interest in one third of the dividends, and each of the children of E., and M., took one-third of the capital. *Leach v. Leach*, 495

14. Testator bequeathed a residuary personal fund to trustees, upon trust to apply the dividends for the maintenance of his children, until the youngest should attain twenty-one, and then to divide the same equally between B., D., E., and F., children by his former wife, and G. and H., children by his present wife, *and such other child or children as might be living*, or as his said wife might be *eniente* with at his decease. The testator, at his death, left two other children besides those named in his will, viz. A. and C., who were children by his first marriage:—*Held*, under all the circumstances of the case, that they took no interest in the fund. *Stevens v. Barnard*, 539

15. A testatrix bequeathed two sums of £9,000 to trustees for the benefit of her two daughters and their children; but if either of them should die unmarried, then she gave that daughter's £9,000 to the trustees, upon trust, as to £5,000, part thereof, for the surviving daughter, under the same restrictions as her original portion, and, as to the remaining £4,000, in trust for her two sons, Thomas and George, in equal moieties; and if the survivor of her two daughters should die unmarried, then she directed that the share of that daughter (£14,000) should be divided amongst her three sons, James, Thomas, and George, for their own use and benefit absolutely. Then followed a disposition, in favor of the survivor of Thomas and George, (in the event of either dying unmarried in the lifetime of the surviving daughter,) of the share or shares of the daughter or daughters before bequeathed to them, and a disposition in favor of James of the whole of the said daughter's shares and fortunes, if both Thomas and George should die unmarried. One of the daughters having died unmarried in the lifetime of the three brothers:—*Held*, that Thomas and George were not thereupon absolutely entitled to the £4000. *Young v. Martin*, 582

16. A testatrix, after bequeathing certain property to her two daughters, and to her three sons, Thomas, George, and James, gave the residue of her personal estate unto

her two sons, Thomas and George, if both living at her decease, in equal shares, or, if either of them should be then dead, without leaving issue, wholly to the survivor of them; and if they should be then both dead, without leaving issue, then wholly to her son James; or if he should be then dead, without leaving issue, leaving her said daughters, or either of them, then living, then to and amongst her said daughters, or the survivor of them, equally, or to an only surviving daughter. But nevertheless, she directed that, if either of her daughters, or if any of her sons, should die, leaving issue, the issue of each of her daughters and sons so dying and leaving issue should take their, her, or his parent's respective share of the provisions she had already made for her said daughters and sons, respectively, equally, share and share alike, in case the parent or parents of such issue should not have otherwise appointed the same:—*Held*, first, that the testatrix, by the term "provisions," meant only the residue; secondly, that the two sons, Thomas and George, having survived the testatrix, were absolutely entitled to the residue. *Ibid.*

17. A testatrix, after bequeathing property to her two sons, proceeded thus:—"But I most earnestly wish that my said sons may give or settle their respective shares on their respective daughters, in preference to their sons." *Quære*, whether these words were imperative, or merely precatory. *Ibid.*

18. A testator, after giving to his daughter an absolute power of appointment by will over certain property, recommended, though he did not absolutely enjoin, his said daughter to distribute the same at his decease amongst her daughters in equal shares:—*Held*, that these words were merely precatory. *Ibid.*

19. A testator, by his will, gave the income of shares in a bank to E., a married woman, for life, provided she were a widow at the time of his death, or should become such afterwards, but during her widowhood only; and gave the income during the coverture of E. to P. He also gave P. £800, in case E. should become a widow, in lieu of the income of the shares. By a codicil, the testator revoked the gift of the income, and gave a portion of the income to E. for life, whether she were a widow at the time of his death or not, or should become such afterwards or not. At the time of the testator's death E. was under coverture:—*Held*, that P. was not

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entitled to the \$800 at the death of the
testator, and would become entitled only
in the event of E. becoming a widow
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